

No. 11901

United States
Circuit Court of Appeals
For the Ninth Circuit

MARY BRODERICK, Administratrix with the will annexed, of the Estate of Eugene H. Ware, deceased,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY, a corporation, and THE TRAVELERS INDEMNITY COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Northern Division

FILED

JUN 24 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD**

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*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States, for the
District of Idaho, Northern Division

No. 1562

EUGENE H. WARE,

Plaintiff,

vs.

THE TRAVELERS INSURANCE COMPANY,
a corporation of the State of Connecticut and
THE TRAVELERS INDEMNITY COM-
PANY, a corporation of the State of Connec-
ticut,

Defendants.

COMPLAINT

Plaintiff complains and for cause of action
against said defendants, alleges and states:

I.

That at all the times hereinafter mentioned, the plaintiff, Eugene H. Ware, was and still is a citizen and resident of Coeur d'Alene, Kootenai County, Idaho and the defendants Travelers Insurance Company and the Travelers Indemnity Company, and each of them, were and still are corporations organized and existing under and by virtue of the laws of the State of Connecticut and doing business in the State of Idaho, and that the amount involved in this action exceeds the sum of \$3,000, exclusive of interest and costs.

II.

That the plaintiff Eugene H. Ware also known as E. H. Ware, since January 1, 1936, has been and

now is a duly qualified and licensed residence insurance agent according to the laws of the State of Idaho, and at all the times mentioned since he was qualified, has been and now is a licensed agent and resident of Coeur d'Alene, Kootenai County, Idaho. That the said Eugene H. Ware or E. H. Ware also does business as Eugene H. Ware Co., and the said defendants caused said plaintiff to be duly licensed as their resident agent in the State of Idaho and caused a certificate of said appointment to be made and delivered to the plaintiff, and the plaintiff at all the times hereinafter mentioned, [3] has been, and still is a duly appointed, qualified, acting and licensed resident insurance agent, and the duly appointed, qualified, and acting resident agent of the defendants, and in all of the acts herein alleged, acted as the resident agent of said defendants and doing the acts as herein set forth.

III.

That on or about the first day of October, 1936 the plaintiff entered into a written contract as such resident agent with the above named defendant companies and each of them, whereby said plaintiff was authorized by said defendants to write insurance on various types, a copy of which is hereto attached marked Exhibit "A" and made a part of this complaint as fully as if set out in full herein and plaintiff alleges that all of the statements contained in said contract are true and correct and that at all the time since Oct. 1, 1936, the plaintiff has been at the request of said defendants, and each

of them, licensed by the State of Idaho as a resident agent of said defendants and each of them and under said contract and under the laws of the State of Idaho, plaintiff was entitled as such resident agent to a commission as provided in said contract and Exhibit "A", on all policies written by the Companies and each of them, and submitted to said plaintiff for counter signature as resident agent of said companies and that the laws of the State of Idaho require that all insurance written by the defendants, who are foreign corporations, covering persons or property within the State of Idaho, be written through their duly licensed Idaho resident agents and only through through their duly licensed Idaho resident agents and further provides that it is unlawful for either of said defendants to write, place or cause to be made, written or placed in this State any policy, bond, duplicate policy or contract of insurance of any kind or character of any general or floating policy upon persons or property, resident, situated or located in this state unless done through agents who are residents of this State, legally commissioned and licensed to transact insurance business herein and that an Idaho resident agent shall countersign all policies of insurance so made (except policies [4] of life insurance,) and shall receive the full commission when the premium is paid, except when the policy is made, written or placed by a licensed broker in which event the countersigning agent shall receive a commission of not less than 5% of the premium paid and that all of the business written through the policies referred

to in this complaint were submitted to the plaintiff by the defendants and not through a licensed broker.

That with said original contract the said defendants furnished the plaintiff a letter of instruction, which is in reality a part of said contract, which is hereto attached marked Exhibit A1 and made a part hereof. That said contracts were amended by letters, true and correct copies of said amendments are hereto attached marked Exhibit A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9.

IV.

That at all times since the 5th day of December, 1940, the plaintiff, Eugene H. Ware and Evelyn Thomas, an employee of the plaintiff, have been and are made, constituted and appointed by said Travelers Indemnity Company its true and lawful attorney-in-fact and with full power of authority for and on behalf of the Company as surety to execute and deliver and affix the seal of the Company thereto, to bonds, undertakings, recognizances or other written obligations in the nature thereof, not exceeding the amount of \$100,000 in any single instance under and by reason of a written instrument dated the 5th day of December, 1940 executed by said Travelers Indemnity Company, a copy of such instrument is attached hereto, marked Exhibit "B", and made a part of this complaint as fully as if set out herein and the facts stated in said Exhibit B are alleged to be true.

V.

That the said Travelers Insurance Company and the Travelers Indemnity Company, are concerns

owned, managed and controlled by the same persons and that they with other companies constitute what is generally known as the Traveler's Line, writing various kinds of [5] insurance and said business is done largely through the same agents and their business is so co-mingled that the plaintiff is unable to tell just what their relations are as they handle their business in a joint manner and largely as one Company and concern.

That the Travelers Insurance Co. is licensed to do business in the State of Idaho and to write within the State of Idaho all forms of liability insurance including workmen's compensation insurance, occupational disease insurance, employer's liability, public liability, automobile liability, auto property damage liability, contractor's liability and various other classes of liability insurance of which a more definite description cannot be given by this plaintiff, but which is known to said defendant.

That the defendant Traveler's Indemnity Company was and is, at all times, authorized to do business in the State of Idaho and licensed to write fidelity and surety business, health and accident, all classes of liability above referred to, plate glass, boiler machinery, burglary, sprinkler, team and vehicle and miscellaneous insurance as classified and described by the laws of the State of Idaho but the plaintiff is unable to state more specific, or give a more definite description of what said company is authorized to write and the same cannot be given by the plaintiff but is know to the defendants.

That the plaintiff is unable to state just what specific kind of insurance are written by each of the defendants, or just what relation exists between the two defendants, but plaintiff alleges that said Travelers Insurance Company owns the Travelers Indemnity Company and that said companies have some arrangement of which the plaintiff cannot give a more definite description whereby the premiums collected from policy holders of Idaho business are pro-rated or divided in some manner in said company and that they are operating under a system whereby the business is jointly conducted and operated substantially as one business. The plaintiff cannot state more definitely than is stated in this complaint what premiums on the business referred to in this complaint as written or [6] countersigned by the plaintiff were collected or went to either of said defendants individually, but allege that all of the premiums on all of the business or policies countersigned by the plaintiff were owed by and paid to the defendant companies and said defendant companies and each and all of them under the allegations herein set forth are indebted to the plaintiff for the commissions as provided in the above mentioned contract, referred to as Exhibit "A."

VI.

Plaintiff alleges that according to his information and belief the defendant, Traveler's Insurance Company, wrote all of the workmen's compensation, occupational disease, employer's liability insurance, auto liability and comprehensive liability

and that under the arrangements and contracts set forth under the laws of the State of Idaho, and on or about the 24th day of May, 1942, the defendants submitted to the plaintiff at Coeur d'Alene, Idaho by mail for the counter-signature, three policies of insurance, a more definite description of which cannot be set forth than is given, except that the plaintiff informed and believes and therefore alleges that the Travelers Insurance Company, under the arrangement existing between said companies relative to the division of the premium, a more definite description of which cannot be given by the plaintiff, were entitled to and collected the premiums on said policies and said policies were submitted to the plaintiff for countersigning as resident agent and no copy of said policies were submitted to the plaintiff, or left with him and the plaintiff has not a copy of said policy, or any of the policies mentioned and cannot give a more definite description of said policy than is herein set forth, but that the defendants have said copies and all thereof in their possession and know the content and the exact amount thereof and all the terms and conditions thereof.

VII.

That among the policies submitted on or about the 25th day of May, 1942, was a policy of the Travelers Insurance Company W.U.B. No. 863386 [7] insuring Walter Butler Company, a contractor building the Farragut Naval Station at or near Bayview within the State of Idaho, and that said policy included all sub-contractors of said Walter Butler Company and said Walter Butler Company from

the 28th day of April, 1942 to the 28th day of April 1944; that said policy provided that the policy holder was insured against the operations as set forth in said policy; that the plaintiff cannot state just what the said operations were except that said policy did cover the employer's liability within the State of Idaho for workmen's compensation insurance, occupational disease insurance and employer's liability insurance; that said policy provided a loss constant under code 0023 of \$5.00 and an expense constant under code 0020 of \$10.00; that the estimated premium for the compensation insurance was \$295,265.00 and that the estimated premium of the occupational disease was \$1,520.00 and that the deposit premium made by the contractor under said policy at the time of writing of said policy was \$44,517.75.

That among policies so submitted was policy W. S.L.A.863388 of the Travelers Insurance Company insuring Walter Butler Company, contractor, and all sub-contractors, as described in an endorsement to said policy against certain auto liability including public liability and property damage; that the deposit premium for said public liability was \$60.99 and the deposit premium for the property damage was \$30.38 and that said policy was designated a comprehensive auto liability policy, a more definite description of which cannot be given by the plaintiff, but said policy is in the possession of said defendants and they have the information and know the description thereof and all questions in regard thereto.

VIII.

That among the policies so submitted to said plaintiff for countersigning was W.S.L.G. 843387 of the Travelers Insurance Company, insuring said Walter Butler Company against comprehensive general liability in the amount of \$50,000 involving one person in any accident [8] and \$100,000 involving more than one person in any one accident, and that the estimated premium was \$19,403.62 and the deposit premium was \$2,910.54. That upon the receipt of said policies and each of them from said defendant companies, the plaintiff acted as their resident agent under the laws of the State of Idaho, and in accordance with the laws of the State of Idaho and in accordance with the instructions received from the defendant, countersigned the policies, the original or original copies of which said policies the defendants have in their possession and said policies and all thereof were returned to the defendants by the plaintiff and that the plaintiff kept no copy thereof and does not have the same now and cannot set out said policy in full.

That with the said three policies of insurance above mentioned there was submitted a bond written by the defendant Travelers Indemnity Company for counter signing by the plaintiff as resident agent, and under instructions from said defendant, and particularly the Travelers Indemnity Company, a copy of which instructions the defendants have in their possession, the bond was countersigned by the plaintiff as resident agent, and mailed by the plaintiff at the instance and request of said defendants

and filed with the Industrial Accident Board of the State of Idaho and that said bond was issued by said defendant the Travelers Indemnity Company concurrently with the above named policies and was written by said defendant, the Travelers Indemnity Company as surety and the Walter Butler Company as principal and that said bond was issued necessarily for the purpose of securing the full discharge of the Walter Butler Company's obligation for compensation or other benefits under the laws of the State of Idaho, which obligations were assumed under said policies so written, and was in fact a part of the insurance covered by said policies and that said policy of insurance above mentioned and said bond remained in full force and effect up until the 28th day of April, 1943, when said policies and bond were renewed for another year by said defendant companies, said bond was renewed and continued and kept in force for another year by the said defendants and [9] by the plaintiff countersigning as resident agent a renewal certificate, which certificate was submitted to the plaintiff by the defendant companies and filed by the plaintiff at the request of the defendant companies with the Industrial Accident Board of the State of Idaho. The plaintiff does not have a copy of said renewal certificates, bonds or policies and does not know the contents thereof except as herein stated, but the defendant companies do have copies of all said policies, bonds and renewal certificates, a copy of which said renewal certificate is hereto attached marked Exhibit "C" and made a

part hereof as fully as if written herein, and the plaintiff has no means of knowing more definitely as set forth the amount of premiums collected and earned under any and all policies and bond, but the plaintiff alleges that under said policy W.U.B. 863386 the premiums so earned and collected were in excess of \$900,000.00 and that the premiums under the other policies were in excess of the amounts estimated therein, but the plaintiff cannot give a definite statement of said premiums so collected and earned and asks that the defendants be required to disclose to the Court and to the plaintiff, the amount of premiums collected under the various classifications of each and all of the policies and bond above described and mentioned, the amount of said premiums depending on the actual amount of pay roll and the defendants ascertained from time to time by investigation of the Walter Butler Company's records, which information the defendants have and which the plaintiff does not have.

Plaintiff further alleges that on or about the 26th day of February, there was submitted to him as countersigning resident agent of said companies, for signature, a policy of said company designated H.S.P. 908557 to said Walter Butler Company covering the public liability of the property described as that of the Bozanta Tavern and certain other buildings located at or near Hayden Lake in Kootenai County, Idaho; that the plaintiff cannot give a more definite description of the policy which was signed by him and returned to said companies and cannot state the amount of the premiums collected

or [10] earned under said policy but that said policy was countersigned by the plaintiff under the same authority as the other policies first mentioned in this complaint and that the defendants have said policy in their possession and know all of said facts.

That on or about the 25th day of February, 1943, there was also submitted to the plaintiff by the defendants for countersignature as agent the original of a policy marked U.B. 908556, which the plaintiff believes covers the compensation insurance on the employees of the Walter Butler Company operating the Bozanta Tavern and Hotel and the business in connection therewith. That the plaintiff was not furnished and does not have a copy of either of the last two mentioned policies and cannot give a more definite description of the policy or policies or premiums earned or codes and classifications contained in said policies as are herein set forth, but the defendants have all of said information in their possession.

IX.

Plaintiff alleges and believes that the estimated premiums on said compensation policy last mentioned amounted to \$216.00 and that all of the premiums of the policies herein mentioned were paid direct by the said Walter Butler Company to the said defendants and the plaintiff has no means of knowing when the premiums were paid or collected or the amount of the premiums so earned and collected; and the estimated payroll account of said Walter Butler Company and various other information which the defendants themselves secured and

have and therefore the defendants have within their possession all of said information and know the amounts of all premiums earned and collected on all of the above described policies and plaintiff alleges that he is entitled to the full commission as provided for in Exhibit "A" of the premiums earned and collected on all of the above described policies and that no part of said commissions have been paid to the plaintiff whatever by the defendants, or either of them, or by any one on their behalf and it is necessary that the defendants be made to divulge to [11] the plaintiff, and to the Court the amount of premiums earned and collected under all of the various classifications of all of the above policies and plaintiff alleges that the insurance written by said defendants as above described on all of the policies above mentioned were written on persons and property within the State of Idaho and were made, written, placed or caused to be made, written or placed in this State on property and persons situated and located in the State of Idaho and that said policies, as the plaintiff is informed and believes were issued to the Walter Butler Company, which the plaintiff is informed and believes was organized and existing under the laws of the State of Minnesota.

That the plaintiff has no definite description of said policies then that given, except that the Walter Butler Company referred to was the General Contractor who built the Naval Base known as Farragut Naval Station, Kootenai County, Idaho, and that the plaintiff has no more definite knowl-

edge as to just who prepared said policies for the defendant companies, but alleges that all of the policies were written by the Company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that the plaintiff acted as countersigning agent direct and not through any licensed broker.

That the plaintiff does not know, or has no way of knowing the exact amount of the premiums earned and collected by the defendants by reason of said policies, but alleges that he is entitled to at least 10% commission thereon and that said sum amounts to, and is in excess of \$90,000.

Wherefore, the plaintiff prays judgment against said defendants.

I.

That an order may be made by the Court requiring the defendants and each of them to divulge to the Court and to this plaintiff the amount of premiums earned and collected under all of the various classifications and under all of the policies set forth and described herein [12] and all of the insurance written by the defendants as above described and that upon said information being furnished that the plaintiff have judgment against the defendants, and each of them in a sum equal to the commissions as provided for in Exhibit "A," on all of the premiums earned and collected by the defendants by reason of said policies and plaintiff alleges that said sum amounts to and is in excess of the sum of \$90,000 with interest thereon at the rate of 6% per annum, from the date when said commission be-

came due, together with plaintiff's costs and disbursements herein expended.

EZRA R. WHITLA,
E. T. KNUDSON,
WHITLA & KNUDSON,
Attorneys for Plaintiff.

State of Idaho,
County of Kootenai—ss.

Eugene H. Ware, being first duly sworn, on oath, deposes and says; I am the above named plaintiff, that I have read the above and foregoing complaint, know the contents thereof and verily believe the facts therein stated to be true.

EUGENE H. WARE,

Subscribed and sworn to before me this 26th day of February, A.D., 1944.

[Seal] EVELYN M. THOMAS,
Notary Public for the State of Idaho, residing at
Coeur d'Alene. My Commission expires
3/19/45. [13]

EXHIBIT "A"

The Travelers Insurance Company—The Travelers Indemnity Company, both of Hartford, Connecticut, hereinafter called the Company, and Eugene H. Ware Company of Coeur d'Alene, Idaho, hereinafter called the Agent, for the considerations hereinafter expressd, agree together as follows:

1. The territory within which the Agent may act shall be the following: Coeur d'Alene and Vicinity, Idaho.

2. This contract shall become effective on the 1st day of October, 1936, and the services of the Agent shall begin on that date.

3. The Agent agrees to transact all business for the Company in accordance with its rules and instructions now in force or hereafter issued; to promptly collect and account for all premiums; and to promptly forward proposals and report his collections to the Company's Branch office at Seattle, Washington.

4. During the continuance of this contract the Company will pay on premiums reported and paid, on policies issued effective on and after the date on which this contract shall become effective on proposals secured by or through the agent, as full compensation for all services and full reimbursement for all expenditures, commissions as follows:

PART I.

On Workmen's Compensation and Employers' Liability Premiums, except Underground Coal Mining Risks.....	10	Per Cent
On Workmen's Compensation and Employers' Liability Premiums on Underground Coal Mining Risks.....	5	Per Cent
On all other forms of Liability Premiums, except Automobile Liability Premiums upon Public Passenger Carrying Risks....	17½	Per Cent
On Automobile Liability Premiums upon Public Passenger Carrying Risks	10	Per Cent

Part II

On all forms of Burglary Insurance Premiums.....	20	Per Cent
On all forms of Plate Glass Insurance Premiums.....	22½	Per Cent
On all forms of Steam Boiler, Engine, Flywheel, Machinery and Electrical Equipment Premiums.....	17½	Per Cent
On Automobile Property Damage and Collision Premiums, except Property Damage Premiums upon Public Passenger Carrying Automobile Risks	20	Per Cent

e. On Property Damage Premiums upon Public Passenger Carrying Automobile Risks.....	10 Per Cen
f. On Property Damage and Collision Premiums other than Automobile	17½ Per Cen

*An additional allowance of 2½% will be granted to the Agent for adjustment of claims and making inspections of Plate Glass when these services are actually performed.

5. The Agent shall also be entitled to the above mentioned commission upon additional premiums upon risks written or renewed by him during the continuance of this contract, which shall become due and are paid to the Company, provided that commissions thereon shall not have been paid to, or shall not be due to any other person, but the Agent shall not be entitled to any commission upon additional premiums upon any risk not written by him. If the Company shall return to any insured premiums for any period, the Agent shall repay to the Company the commission on the portion of the premiums so returned theretofore paid to or deducted by the Agent upon such risk.

6. All moneys and other property collected or received by the Agent for or on behalf of the Company shall be held in a fiduciary capacity and shall not be used by him for any purpose whatsoever except as herein specifically authorized, but shall be delivered as soon as possible to the Company or to the Cashier at the Branch Office to which the Agent reports or, upon demand, to its Manager or other authorized representative of the Company.

7. The Agent shall be responsible for all risks placed on the books of the Company through his agency by any sub-agents or brokers together with

all premiums or moneys collected by them in connection with such risks.

8. The Agent is authorized to countersign Policies of Insurance, Renewal Receipts, Certificates, and Endorsements pertaining to the lines of insurance covered by this contract, unless otherwise advised.

9. The Agent shall also render statements, and deliver over moneys, vouchers, policies, renewal receipts, and other property of the Company at any time when requested by an authorized representative of the Company, and shall at all times conform to and comply with the manual rules and other instructions of the Company in relation to its business. [15]

10. All accounts, vouchers, and records and all other documents and all correspondence pertaining to the Company's business shall at all times be open to examination by its Manager or other authorized representative.

11. The Agent has no authority to make, alter, vary or discharge any contract; or to extend the time for payment of premiums; or to waive or extend any obligation or condition; or to incur any liability in behalf of the Company; or to receive any money due or to become due to the Company, except on policies, renewal receipts, and additional premium statements sent to him for collection.

12. If the Agent shall neglect to report and pay over premiums collected by him as directed or shall otherwise violate any of the provisions hereof, all of his rights under this contract, including the right

to commissions on all premiums payable thereafter, shall thereby forthwith terminate.

13. The Agent further agrees that he will conform to, and adhere strictly to the Rules concerning Acquisition Cost and Field Supervision Cost for Casualty Insurance Companies and Agents approved by the National Convention of Insurance Commissioners December 7, 1922, in so far as they apply to him.

14. If the Company shall discontinue business in the territory in which the Agent is authorized to act, this contract shall cease at once upon notice to the Agent of such discontinuance, and the Agent shall have no claim on it thereafter for any charges or services or for any damages on account of such discontinuance.

15. The Agent shall not insert any advertisement respecting this Company in any publication without the written authority of the Company first obtained, nor shall he offer or pay rebates of premium on any line of insurance covered by this contract.

16. All former contracts between the Agent and the Travelers Insurance Company or the Travelers Indemnity Company relating to lines of insurance covered by this contract, together with all supplements thereto, if any are [16] hereby canceled, and the Agent shall hereafter act for the Company in said lines of insurance under this contract only.

17. If this contract shall be terminated by either party for any cause whatever, the remuneration which shall then have been paid to the Agent, together with the amount then due him under this

contract, shall be in full settlement of all claims and demands upon the Company in favor of the Agent under this contract, and all further remuneration which a continuance of said contract might have secured to him shall be waived and forfeited.

18. Either party to this contract may terminate the same by giving to the other party notice in writing to that effect, and the power of the Agent to collect and receive premiums shall end with the termination of this contract.

In witness whereof, The Travelers Insurance Company and The Travelers Indemnity Company have caused these presents to be signed at the Home Office and the Agent has subscribed his name hereto this 1st day of October, 1936.

THE TRAVELERS
INSURANCE COMPANY,

THE TRAVELERS

INDEMNITY COMPANY,

/s/ L. E. ZACHER.

Agent.

/s/ WALTER E. MALLORY,

Agent Secretary.

/s/ WARREN G. WILLSEY,

Asst. Registrar, Agency Dept.

EUGENE H. WARE COMPANY,

/s/ EUGENE H. WARE, Pres.,

Nominated by

/s/ WILLIAM P. SIZEMORE,

Manager. [17]

EXHIBIT A-1

The Travelers

The Travelers Insurance Company

The Travelers Indemnity Company

The Travelers Fire Insurance Company

L. Edmund Zacher, President

Hartford, Connecticut

Agency Department

Walter E. Mallory, Agency Secretary.

October 1, 1936.

Eugene H. Ware Company, Agent.

Coeur d'Alene, Idaho.

Gentlemen:

Having been appointed an Agent of The Travelers under Casualty contract and licensed with The Travelers Fire Insurance Company for Automobile Fire and Theft lines, you are hereby authorized to countersign policies of Insurance, Certificates and Endorsements pertaining to such lines so long as you remain a Casualty contract Agent and during the continuance of your Fire license.

Yours very truly,

/s/ WALTER E. MALLORY,

Agency Secretary. [18]

EXHIBIT "A-2"

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: All Agents, Casualty Lines.
Subject: Commissions.

City or Town.

June 1, 1940.

You are hereby informed that until otherwise advised, on risks written on a Retrospective or Special Commission basis, on risks or portions of risks which are in states other than that indicated in the territory described in your Agency Agreement, and on Bonds involving execution or countersignature by another Agent (provided your Agency Agreement includes Surety Lines), the commissions which you may retain out of premiums paid to the Company will be fixed on the basis of the individual risk, anything in your Agency Agreement to the contrary notwithstanding.

Please attach this letter to your Agency Agreement, Casualty Lines, of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [19]

EXHIBIT A-3

The Travelers
Hartford Connecticut

From: Walter E. Mallory, Agency Secretary.
To: All Agents, Casualty Lines.
Subject: Commissions on Automobile Medical Payments Premiums.

City or Town.

September 20, 1939.

You are hereby informed that until otherwise advised, you may retain out of premiums paid to the Company on Automobile Medical Payments coverage the same commission as at present provided under your Agency Agreement, Casualty Lines, on Automobile Liability premiums other than Safe Driver Reward risks.

Please attach this letter to your Agency Agreement of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [20]

EXHIBIT A-4

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: General Agents, Regional Agents and
Agents, Casualty Lines, U.S.A.
Subject: Commissions on Automobile Premiums.

City or Town.
February 23, 1938.

In order to conform with further Ruling of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance, you are hereby informed that until otherwise advised, on any policies of Automobile Liability (Bodily Injury) and Property Damage insurance on Private Passenger Cars issued on a specified car basis in any state where the "Safe Driver Reward Plan" is in effect, which policies both new and renewal are issued to become effective on and after February 1, 1938, you will be allowed to retain out of premiums paid to the Company the same commission as would be paid if such policy were issued under the "Safe Driver Reward Plan," anything in your Casualty Agency Agreement or any supplements, amendments, or riders thereto to the contrary notwithstanding.

In all other respects your said Agency Agreement remains unchanged.

/s/ WALTER E. MALLORY,
Agency Secretary. [21]

EXHIBIT A-5
The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Agents, Casualty Lines, U.S.A.
Subject: Commissions on Automobile Premiums.

City or Town.

January 27, 1938.

In order to conform with the rules and requirements of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance, you are hereby informed that until otherwise advised, on policies of Automobile Liability (Bodily Injury) and Property Damage insurance on Private Passenger Cars issued under the "Safe Driver Reward Plan" and, in any states where the "Safe Driver Reward Plan" is in effect, on policies of Automobile Liability (Bodily Injury) insurance when written separately from Property Damage insurance and on the specified car basis at the regular manual rates, which policies both new and renewal are issued to become effective on and after February 1, 1938, you will be allowed to retain out of premiums paid to the Company a commission of 15% in lieu of the rate of commission stated in your Casualty Agency Agreement or supplements thereto on Automobile Liability and Property Damage premiums on Private Passenger Cars.

In all other respects your said Agency Agreement remains unchanged.

Please attach this letter to your Casualty Agency Agreement of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [22]

EXHIBIT A-6
The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Regional Agents and Agents—Casualty Lines.
Subject: Commissions on Burglary Premiums—Securities Insurance covering on the Premises of the Assured or in the Custody of Outside Messengers.

City or Town.

March 1, 1937.

In order to conform with the recently amended rules of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed, on premiums paid to the Company, for Securities Insurance covering on the Premises of the Assured or in the Custody of Outside Messengers on policies both new and renewal written to become effective on and after February 15, 1937, a commission of 10% in lieu of the rate of commission or any Field Supervision Allowance stated in your contract or supplements thereto on Burglary premiums as previously allowed on such risks.

In all other respects your said contract remains unchanged.

Please attach this letter to your agency contract of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [23]

EXHIBIT A-7

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Agents—Casualty Lines.
Subject: Premier Residence Policy.

City or Town.
March 10, 1931.

Supplementing your contract with The Travelers Companies, Casualty lines, you are hereby informed that until further notice and subject to the terms of your contract you will be allowed a commission of 20% on the premiums of the above form of policy, both new and renewal, which premiums are reported and paid by you to the Company.

In all other respects your said contract remains unchanged.

Yours very truly,

/s/ WALTER E. MALLORY,
Agency Secretary. [24]

EXHIBIT A-8

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency Secretary.
To: Regional Agents and Agents—Casualty Lines.
Subject: Commissions on Burglary Premiums—Securities Insurance Covering on the Premises of the Assured.

City or Town.
July 15, 1936.

In order to conform with the recently amended rules of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed on premiums paid to the Company for Securities Insurance Covering on the Premises of the Assured on policies both new and renewal written to become effective on and after August 1, 1936, a commission of 10% in lieu of the rate of commission or any Field Supervision Allowance stated in your contract or supplements thereto on Burglary premiums as previously allowed on such risks.

In all other respects your said contract remains unchanged.

Please attach this letter to your agency contract of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [25]

EXHIBIT A-9.

The Travelers
Hartford, Connecticut

From: Walter E. Mallory, Agency.
To: Regional Agents and Agents, Casualty Lines.
Subject: Commissions on Liability and Property Damage Premiums on Long Haul Truckman Risks.

City or Town.
January 25, 1936.

In order to conform with the recently amended rules and requirements of the Conference on Acquisition and Field Supervision Cost for Casualty Insurance you are hereby informed that until otherwise advised you will be allowed on the premiums on Liability and Property Damage Insurance covering Long Haul Truckman Risks, as defined in the Automobile Manual, on policies both new and renewal written to become effective on and after December 31, 1935, which premiums are paid to the Company, a commission of 10% instead of the rates of commission stated in your contract or supplements thereto applicable to Automobile Risks.

The foregoing shall in no way modify the rates of commission payable on premiums covering Bodily Injury Liability representing Statutory Coverage under the Massachusetts Compulsory Automobile Liability Security Act which commissions remain unchanged.

Please attach this letter to your agency contract
of which it forms a part.

/s/ WALTER E. MALLORY,
Agency Secretary. [26]

EXHIBIT "B"

The Travelers Indemnity Company
Hartford, Connecticut
Power of Attorney

Know All Men By These Presents:

That The Travelers Indemnity Company, a corporation of the State of Connecticut, does hereby make, constitute and appoint

E. H. Ware, James Barrett and Evelyn Thomas, all of Coeur d'Alene, Idaho, Each

its true and lawful Attorney(s)-in-Fact, with full power and authority, for and on behalf of the Company as surety, to execute and deliver and affix the seal of the Company thereto, if a seal is required, bonds, undertakings, recognizances or other written obligations in the nature thereof, as follows:

Any and all bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding in amount One Hundred Thousand Dollars (\$100,000) in any single instance

and to bind The Travelers Indemnity Company thereby, and all of the acts of said Attorney(s)-in-

Fact, pursuant to these presents, are hereby ratified and confirmed.

This appointment is made under and by authority of the following by-laws of the Company which by-laws are now in full force and effect:

Section 8. The President, any Vice-President, and Secretary or any Department Secretary may appoint attorneys-in-fact or agents with power and authority, as defined or limited in their respective powers of attorney, for and on behalf of the Company to execute and deliver, and affix the seal of the Company thereto, bonds, undertakings, recognizances or other written obligations in the nature thereof and any of said officers may remove any such attorney-in-fact or agent and revoke the power and authority given to him.

Section 10. Any bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when signed by the President or any Vice-President and duly attested and sealed if a seal is required, by any Secretary or any Department Secretary or any Assistant-Secretary, or when signed by the President or any Vice-President and countersigned and sealed, if a seal is required, by a duly authorized attorney-in-fact or agent; and any such bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when duly executed and sealed,

if a seal is required, by one or more attorneys-in-fact or agents pursuant to and within the limits of the authority granted by his or their power or powers of attorney.

In witness whereof, The Travelers Indemnity Company has caused these presents to be signed by its proper officer and its corporate seal to be hereunto affixed this 5th day of December, 1940.

THE TRAVELERS
INDEMNITY COMPANY,
By J. C. SMITH,
Secretary. [27]

State of Connecticut,
County of Hartford—ss.

On this 5th day of December in the year 1940 before me personally came J. C. Smith to me known, who, being by me duly sworn, did depose and say: that he resides in the State of Connecticut; that he is Secretary of The Travelers Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation, and that he signed his name thereto by like authority.

ROBERT FERGUSON, JR.,
Notary Public.

State of Connecticut,
County of Hartford—ss.

I, F. P. Hayden, Assistant Secretary of The Travelers Indemnity Company, a corporation of the State of Connecticut, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of Hartford, this 5th day of December, 1940.

F. P. HAYDEN,
Assistant Secretary. [28]

EXHIBIT "C"

The Travelers Indemnity Company
Hartford, Connecticut
(A Stock Company)

Idaho Compensation Surety Bond No. 28730 executed May 14, 1942 on behalf of Walter Butler Incorporated, of Pend d'Oreille, Idaho in favor of the State of Idaho, is hereby continued in force for the period beginning April 28, 1943, and ending April 28, 1944, subject to all the covenants and conditions of the said original bond to the same extent if said covenants and conditions were incorporated herein.

In Witness Whereof, The Travelers Indemnity Company has caused these presents to be executed

and its corporate seal attached this 8th day of March, 1943.

THE TRAVELERS
INDEMNITY COMPANY
By R. H. WADSWORTH,
Attorney-in-Fact.
By V. J. DUFFY,
Attorney-in-Fact.

Countersigned at Coeur d'Alene, Idaho.

EUGENE H. WARE CO.
By E. H. WARE
Resident Agent.

Continuation Certificate for Idaho Compensation Surety Bond.

S-667

#963

[Title of District Court and Cause.]

ANSWER

Come Now the defendants and in answer to the complaint state:

First Defense

The complaint fails to state a claim against the defendants or either of them upon which relief can be claimed.

Second Defense

1. Defendants deny each and every allegation contained in the complaint except as hereinafter admitted.

2. With respect to Paragraph I of the complaint, defendants admit that the plaintiff Eugene H. Ware was a citizen and resident of Coeur d'Alene, Kootenai County, Idaho, and the defendants Travelers Insurance Company and Travelers Indemnity Company, and each of them, were and still are corporations organized and existing under and by virtue of the laws of the state of Connecticut and doing business in the State of Idaho. Defendants deny each and every other allegation therein contained.

3. With respect to Paragraph II of the Complaint, defendants admit that the plaintiff, Eugene H. Ware, also known as E. H. Ware, [30] since January 1, 1936, and during his lifetime was a duly qualified and licensed insurance agent according to the laws of the State of Idaho, residing in Coeur d'Alene, Kootenai County, Idaho. That said Eugene H. Ware, or E. H. Ware, also did business as Eugene H. Ware Co., and the defendants caused the said Eugene H. Ware to be duly licensed as their resident agent in the State of Idaho and caused a certificate of said appointment to be made and delivered to the said Eugene H. Ware. Defendants deny each and every other allegation therein contained.

4. With respect to Paragraph III of the complaint, defendants admit that on or about the first day of October, 1936, Eugene H. Ware entered into a written contract with the defendants, and each of them, as set forth in Exhibits A and A-1 and that such contract was amended subsequently as stated in Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, and

A-9, but deny each and every other allegation therein contained except in this answer hereinafter admitted.

5. With respect to Paragraph IV of the complaint, defendants admit the allegations therein contained.

6. With respect to Paragraph V of the complaint, defendants admit that The Travelers Insurance Company and The Travelers Indemnity Company are corporations owned, managed and controlled by the same persons and that they, with other companies, constitute what is generally known as The Travelers line writing various kinds of insurance and said business is done largely through the same agents. That The Travelers Insurance Company was and is licensed to do business in the State of Idaho and to write various types of insurance not including automobile property damage, or any other property damage liability insurance; that the defendant The Travelers Indemnity Company was and is at all times authorized to do business in the State of Idaho and licensed to write the various types of insurance alleged. Defendants deny each and every other allegation therein contained.

7. With respect to paragraph VI of the complaint, defendants admit that The Travelers Insurance Company wrote the Workmen's Compensation and Employers' Liability insurance, the Employers' Liability coverage for Occupational Disease, the Automobile Bodily Injury Liability and the Comprehensive Bodily Injury Liability afforded in three policies of insurance more specifically described in

Paragraphs VII and VIII of the complaint and that said policies were issued as alleged in Paragraph VII of the complaint to Walter Butler Company, a contractor, who built the Farragut Naval Training Station at or near Bayview within the State of Idaho, and was entitled to and collected the premiums for such coverages on said policies; that on or about May 24, 1942, the aforesaid three policies of insurance were by mail submitted to Eugene H. Ware at Coeur d'Alene, Idaho, for countersignature; defendants further admit that no copies of the aforesaid three policies of insurance were submitted to the plaintiff or were left with him; defendants further admit that they know the contents of said policies and all of their terms and conditions. Defendants deny each and every other allegation therein contained.

8. With respect to Paragraph VII of the complaint, defendants admit that among the policies submitted on or about May 25, 1942, was a policy of The Travelers Insurance Company W.U.B. #863386 insuring Walter Butler Company, a contractor building the Farragut Naval Station at or near Bayview within the State of Idaho; that said policy provided that the policyholder was insured against the operations as set forth in said policy and covered the employer's [32] liability within the State of Idaho for Workmen's Compensation Insurance, occupational disease insurance, and employer's liability insurance; that said policy provided a loss constant under Code 0023 of \$5.00 and an expense constant under Code 0020 of \$10.00;

that the estimated premium for the compensation insurance was \$295,265.00 and the estimated premium of the occupational disease was \$1,520.00 and that the deposit premium made by said contractor under said policy at the time of writing of said policy was \$44,517.75; that also submitted for countersignature was policy W.S.L.A. 863388, the defendant insurers named therein insuring against certain auto liability including public liability and property damage; that the deposit premium for said public liability was \$60.99 and the deposit premium for the property damage was \$30.38; that said policy was designated a comprehensive auto liability policy; that the defendants know the description thereof and have information with respect thereto. Defendants deny each and every other allegation therein contained.

9. With respect to Paragraph VIII of the complaint, defendants admit that policy WSLG-863387 of The Travelers Insurance Company insured said Walter Butler Company against comprehensive general liability in the amount of \$50,000 involving one person in any accident, and \$100,000 involving more than one person in any one accident; that the estimated premium was \$19,403.62 and the deposit premium was \$2,910.54. That Eugene H. Ware countersigned said policy and returned it to the defendants. That defendants further admit that a surety bond covering the liability for workman's compensation and occupational disease compensation was written by the Travelers Indemnity Company concurrently with the three said policies

of insurance with the Travelers Indemnity Company as surety and the Walter Butler Company as principal for the period of one year commencing April 28, 1942; that said bond was submitted with the said [33] three policies of insurance above mentioned for countersigning by Eugene H. Ware; that said bond was countersigned by Eugene H. Ware and was filed with the Industrial Accident Board of the State of Idaho; that said bond was issued for the purpose of securing the full discharge of the said Walter Butler Company's obligations for compensation or other benefits under the laws of the State of Idaho and that said bond was renewed for the period of another year by a renewal certificate and that said certificate was submitted to Eugene H. Ware by The Travelers Indemnity Company for countersignature and was filed by the said Eugene H. Ware with said Industrial Accident Board. Defendants further admit that the obligation of the said Walter Butler Company for compensation or other benefits under the laws of the State of Idaho arising out of the building of the said Farragut Naval Training Station was assumed under compensation policy WUB-863386 of The Travelers Insurance Company. Defendants further admit that the actual amount of pay roll of the Walter Butler Company and certain subcontractors of the Walter Butler Company were used as a basis for computing one element of the premium under said policies. The defendants further admit that liability policy H.P.S. 908557, naming The Travelers Insurance Company as the insurer with respect to bodily in-

jury liability and naming The Travelers Indemnity Insurance Company as insurer with respect to property damage liability, was submitted to Eugene H. Ware in February, 1943, for countersignature and that said policy was issued to the Walter Butler Company covering certain liability in connection with the Bozanta Tavern located at or near Hayden Lake, Idaho; that said policy was countersigned by Eugene H. Ware and was returned to the defendants. Defendants further admit that the workmen's compensation and employers' liability U.B. 908556, naming [34] The Travelers Insurance Company as insurer, was submitted to Eugene H. Ware in February, 1943. That the earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, The Travelers Indemnity Company \$3.43; that the earned premium on policy UB-908556 earned by the Travelers Insurance Company was \$99.45. Defendants deny each and every other allegation therein contained.

10. With respect to Paragraph IX of the complaint, defendants admit that the estimated insurance premium on policy U.B. 908556 was \$216.00; they admit that all the premiums for policy WUB-863386, WSLG-863387, and WSLA-863388 were paid direct by the said Walter Butler Company to the defendants; admit that they have in their possession information and knowledge as to all premiums earned and collected on all of the above described policies; admit that no commissions have been paid to Eugene H. Ware by the defendants, or either of them, or by anyone in their behalf; that

the sole payment made to said Eugene H. Ware was the payment as hereinafter in the Fourth Defense alleged; admit that Walter Butler Company was organized and exists under the Laws of the State of Minnesota; admit that policies WUB-863386, WSLG-863387, WSLA-863388, and policies H.P.S. 908557 and U.B.-908556 describe Walter Butler Company as an insured; that Walter Butler was the general contractor who built the naval base known as Farragut Naval Station, Kootenai County, Idaho; that the first three said policies were written by the company direct to the Walter Butler Company and were written and placed with the Walter Butler Company and that Eugene H. Ware acted as countersigning agent direct and not through any licensed broker. Defendants deny each and every other allegation therein contained. [35]

Third Defense

That Walter Butler Company is and at all times herein mentioned was a corporation organized under and pursuant to the laws of Minnesota. That prior to the issuance of the insurance policies described in the complaint said Walter Butler Company entered into a cost-plus-a-fixed-fee contract with the United States Navy (the performance of which was under the jurisdiction of the Bureau of Yards and Docks of the United States Navy), for the construction of the Farragut Naval Station at or near Bayview within the State of Idaho. That in connection with said contract the Bureau of Yards and Docks of the United States Navy required the hereinafter

described insurance coverage, the cost of such coverage to be paid for under the terms of the aforesaid cost-plus-a-fixed-fee contract by the United States Navy; that said insurance coverage so required was coverage to be issued under what the said Bureau of Yards and Docks originally designated under the name of "Comprehensive Insurance Rating Plan for National Defense Projects" and later designated as "War Projects Insurance Rating Plan." By the terms of the aforesaid Plan, insurance of specified character was required to be issued on a retrospective insurance premium basis that would reflect only the following items of cost:

- (a) A fixed charge to meet the administrative cost of the insurance carrier exclusive of claim administrative cost and to meet losses in excess of the maximum premium.
- (b) Losses incurred.
- (c) A charge of 12% of the losses to take care of administrative claim requirements other than "allocated claim expenses," [36]
- (d) Allocated claim expenses.
- (e) State taxes payable by the insurance carrier on such premiums.

The premiums so determined were in all instances subject to a maximum premium. The maximum premium and the fixed charge premium were percentages of the standard premiums developed under the insurance policies in accordance with their terms exclusive of the Comprehensive Insurance Rating Plan endorsement.

That the aforesaid Plan made provision for the selection and use by a contractor of an insurance advisor and for the payment by the contractor, and only by the contractor for the services of such advisor. That said Plan expressly prohibited the insurance carrier from paying anything whatsoever to such insurance advisor for services rendered by him; that the aforesaid plan did not contemplate and provision was not made therein for the payment of commission to an agent or broker by the insurance carrier. That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan.

That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies:

Policy WUB-863386 being standard workmen's compensation and employers' liability policy issued by the Travelers Insurance Company; policy WSLG-863387 being comprehensive general liability policy issued by The Travelers Insurance Company, and policy WSLA-863388, being comprehensive automobile liability policy issued by The Travelers Insurance Company and The Travelers Indemnity Company. That the aforesaid policy WSLG-863387 is a severally issued policy which carries the name of both The Travelers Insurance Company and The Travelers Indemnity Company. However, The

Travelers Insurance Company was the only insurer with respect to the coverage afforded under said policy WSLG-863387. The policy WSLA-863388 is also a severally issued policy carrying the names both of The Travelers Insurance Company and The Travelers Indemnity Company. Under its terms The Travelers Insurance Company was the insurer with respect to Coverage A, being bodily injury liability, and The Travelers Indemnity Company was the insurer with respect to Coverage B, being property damage liability. The aforesaid policies were written for the period from April 28, 1942, to April 28, 1944. The effective date of these policies was subsequently changed by endorsement to April 10, 1942. The policies were all cancelled effective July 30, 1943, the project having been completed before that date.

That in addition to the aforesaid policies The Travelers Indemnity Company caused to be issued to the Walter Butler Company in connection with the aforesaid naval construction project Idaho Compensation Surety Bond No. 2873. Said Bond was issued pursuant to the requirements of subsection 2 of section 43-1601 of the Idaho Workmen's Compensation Law and covered the liability for workmen's and occupational disease compensation all as hereinabove admitted. No premium was charged the insured for the Compensation Surety Bond, the bond being an undertaking between The Travelers Insurance Company and the Travelers Indemnity Company, and no commission was paid by the defendants to anyone in connection therewith. [38]

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
	Total	<hr/> \$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		<hr/> 37.70
	Grand Total	<hr/> \$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the Comprehensive Insurance Rating Plan Endorsement is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		<hr/>
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
		<hr/>
	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	\$1.87
	O. D. .....	.21
		<hr/>
WSLG-863387	The Travelers Insurance Company	1.13
		<hr/>
	Total	3.21
		<hr/>
	Grand Total	\$ 246,127.56

The aforesaid total premium of \$246,127.56 represents the earned premiums on a retrospective basis in accordance with the terms of said insurance policies, as required by the Bureau of Yards and Docks of the U. S. Navy; that said figure is still subject to final adjustment; that no commission was payable or paid by the defendants to any agent or broker for the placing of the aforesaid business with the defendants; that no commission was payable or paid by the defendants to any agent or broker for any other services in connection with the aforesaid busi-

ness with the defendants except such amount as was paid to Eugene H. Ware for his countersigning service as aforesaid; that Eugene H. Ware had nothing whatsoever to do with making, writing or placing the insurance policies aforesaid or the servicing thereof, his services being confined to the simple formal act of countersigning the aforesaid policies and bond when sent to him by mail for countersignature and by mail forwarding the policies to the defendants in New York in May, 1942, and by mail forwarding the bond to the Industrial Accident Board of Idaho. That no commission was fixed or payable as provided in Exhibit A-2 of the contract attached to the complaint (dealing with risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan.

Filed Dec. 4, 1945. [40]

That policies H.P.S. 908557 and U.B. 908556 described in Paragraph 9 of the Second Defense were made, written and placed in the State of New York and that the premiums for said policies were paid to defendants through the Acme Brokerage Corporation of New York, New York, who placed said insurance business with the defendants.

Fourth Defense

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the de-

defendants as alleged in paragraph III of the complaint, by the terms of which the said Eugene H. Ware was authorized to countersign policies of insurance, renewal receipts, certificates, and endorsements pertaining to the lines of insurance covered by said contract on proposals secured by or through said Eugene H. Ware. That on or about October 21, 1936, the said Eugene H. Ware entered into a supplemental agreement with the defendants by the terms of which defendants agreed to pay to said Eugene H. Ware a monthly remuneration of \$5.00 for a small amount of other countersigning service. That a copy of the letter in connection with said supplemental agreement is hereto attached as Exhibit 1 and made a part hereof as if here set out in full.

That thereafter the defendants paid to the said Eugene H. Ware the monthly remuneration referred to in the said supplemental agreement continuously up to and including October, 1944, and including the period during which the said Eugene H. Ware countersigned policies Nos. WUB-863386, WSLG-863387, and WSLA-863388, the bond and continuation certificate described in the complaint. [41]

That the only service rendered by the said Eugene H. Ware for the defendants, or any other person, for which plaintiff sues was the simple formality of countersigning the policies, the bond and continuation certificate referred to in the complaint, and that for such service defendants paid to the said Eugene H. Ware the amount provided in said supplemental agreement. That by virtue of the mat-

ters in this Fourth Defense alleged, plaintiff waived the benefit, if any, of Section 40-902 I.C.A. as amended by Chapter 61, Idaho Session of Laws of 1939.

Wherefore the defendants deny that the plaintiff is entitled to the relief prayed for in the complaint or any part thereof or to any other relief against the defendants, and pray that the complaint be dismissed with costs.

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

(Copy acknowledged.)

Filed: Dec. 4, 1945. [42]

EXHIBIT 1

October 21, 1936.

Eugene H. Ware Company
104 Fourth Street
Coeur d'Alene, Idaho

Attention: Mr. Ware

Dear Mr. Ware:

Yesterday Field Assistant Gilbert sent you new contract forms to sign in view of the fact that he inadvertently used the wrong form when he secured your signature during his personal visit to Coeur d'Alene last month.

Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency

for handling a small amount of countersigning that will be necessary from time to time, I recommended to our Home Office that your agency be recognized in this manner. I am now in receipt of advices that your agency has been approved for this service as of October 1, 1936. On the basis of a monthly remuneration of \$5.00, payment for the month of October will be forwarded to you as of November 1 by the Auditor and a like amount each month thereafter until otherwise advised.

Yours very truly,

W. P. SIZEMORE,
Manager.

WPS:EP [43]

[Title of District Court and Cause.]

REPLY

Now comes Mary Broderick, Administratrix with the Will Annexed of the Estate of Eugene H. Ware, Deceased, substituted as plaintiff herein and in reply to the answer of the defendants, alleges and states and denies:

I.

In respect to the second defense this plaintiff denies all affirmative matters therein contained except as hereinafter specifically admitted and particularly denies the allegations of paragraph 8 of said first affirmative defense and denies each and every allegation contained in paragraph 9 as to the amount of premiums earned.

II.

In respect to the third defense this plaintiff denies each and every affirmative allegation therein contained and denies each and every allegation of said third defense except such as are admissions of the facts contained in plaintiff's complaint, and allege that, according to the information which this plaintiff has received, the said defendants received from Walter Butler Company in excess of \$1,170,000.00 as premiums for compensation insurance and that they made a report to the State of Idaho setting forth said figures and paid the State of Idaho taxes thereon, and that in addition thereto, the said defendants made demand against Walter Butler Company [44] for payments of said amount and as this plaintiff is informed and believes and therefore alleges the fact to be, said bills were approved and paid and in addition thereto the defendant collected from said Walter Butler Company under the policies alleged in plaintiff's complaint largely in excess of \$100,000.00 for premiums on the contracts of insurance covering property damage and public liability.

In regard to the allegations of said third affirmative defense regarding the execution of the surety bond in connection with the workmen's compensation undertaking, this plaintiff alleges that the same was a part of said agreement and constitutes a part of the contract of said insurance and that, as this plaintiff is informed and believes, the amounts set forth in said third affirmative defense is the amount of \$1,294,608.42 was actually collected by the said

defendants and tax thereon paid to the State of Idaho as and for a tax upon the premiums collected in said work, and this plaintiff denies all of the allegations of said third defense other than as herein specifically alleged. Denies that said E. H. Ware was paid any sum whatsoever for countersigning said policies or that there was any agreement that he was to receive any sum whatsoever therefor other than the standard and regular commission of ten per cent and alleges that any agreement claimed to have been made by the defendant whereby the said Eugene H. Ware or Eugene H. Ware Company, as the resident agent, was not to be paid the full commission provided by law was and is void, prohibited by the Statutes of the State of Idaho and against the public policy of the State of Idaho and, if every made, which the plaintiff denies, was and is void and of no force or effect whatever. Denies that the policies were made, written or placed in the State of New York or that they were written through any brokerage agents except under some arrangement made by the defendants and *with the plaintiff's knowledge whatsoever.* [45]

III.

Further answering said fourth defense, the defendant denies each and every allegation contained in said fourth defense and denies that the purported letter under date of October 21, 1936, attached to the complaint was ever made a contract between the parties was ever written for the purpose of waiving the fees on any business developed in the

territory covered by the plaintiff's contract with the defendant and denies that it had any reference to business written within the territory served by the plaintiff or included in his contract whatsoever and alleges that the same does not constitute any contract or intended by the defendant so to do and was and is null and void and in contravention of the statutes of the State of Idaho and against the public policy of the State of Idaho and of no force or effect whatsoever.

/s/ EZRA R. WHITLA,

/s/ E. T. KNUDSON,

Attorneys for Plaintiff.

[Service Acknowledged.]

Filed: July 18, 1946. [46]

[Title of District Court and Cause.]

No "Motion for Trial" as requested in item 4 of Designation, filed. [47]

[Title of District Court and Cause.]

**MOTION FOR LEAVE TO AMEND ANSWER
BY WAY OF TRIAL AMENDMENT**

Come Now the defendants and, pursuant to Rule 15 of the Rules of Civil Procedure, move the above-entitled court for an order permitting the defendants to amend their answer by way of trial

amendment, adding a Fifth Defense in form hereto attached and made a part hereof.

Defendants further pray that the proposed trial amendment be deemed added to the answer without the necessity of serving or filing an amended answer embodying said trial amendment.

/s/ WM. S. HAWKINS,

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

Filed: Nov. 18, 1946. [48]

[Title of District Court and Cause.]

TRIAL AMENDMENT TO ANSWER
Fifth Defense

That the complaint fails to state a claim against the defendants, or either of them, upon which relief can be claimed in that the statutes of Idaho providing for countersignature by a resident agent of Idaho, as described in paragraph III of the complaint, particularly section 40-902 Idaho Code Annotated, as amended by chapter 61, Law, 1939, page 109, if construed in accordance with the allegations of the complaint, are null and void because in violation of the XIVth Amendment to the Federal Constitution, Section 1 thereof, and in violation of the Commerce Clause of the Federal Constitution, being Article 1 Section 8, Clause 3 thereof; that the aforesaid statutes, particularly said Section 40-902, as amended, are void as in violation of the aforesaid

Federal Constitution in that, among other things, they (1) purport to have extra territorial effect; (2) arbitrarily and capriciously increase the expenses of defendants as foreign insurance companies who write insurance on risks located in Idaho, whether such risks be written within or without the State of Idaho; (3) yield a countersigning agent a pecuniary reward out of all [49] proportion to any services contributed by him; (4) arbitrarily and capriciously deprive the defendants of their liberty of contract, including their liberty to agree as to what is a fair and reasonable compensation for nominal services, and to pay therefor, and (5) unduly and substantially burden, obstruct and discriminate against interstate commerce in the making, writing and placing of insurance.

/s/ WM. S. HAWKINS,

/s/ C. H. POTTS,

/s/ CHARLES HOROWITZ.

Filed: Nov. 18, 1946. [50]

[Title of District Court and Cause.]

ORDER

Motion for inspection of documents before trial, having heretofore been filed by the plaintiff, and have been fully presented, and the Court being advise,

It is hereby Ordered that the said motion be and the same is granted, and

It is further Ordered that the defendants be permitted to furnish copies of all original records, in-

struments and documents made in typewriting, in lieu of producing any of such originals in Idaho, but subject to the inspection of such originals at the home office, and

It is further Ordered that said records and copies be furnished for inspection within twenty days from date hereof.

Dated this 3rd day of April, 1946.

CHASE A. CLARK,
United States District Judge.

Filed: April 3, 1946. [51]

[Title of District Court and Cause.]

ORDER

Motion to require plaintiff to reply to the answer of defendants having been heretofore filed and having been fully presented to the Court and after consideration the Court being advised,

It is Ordered that the said motion be and the same is hereby granted, and

It is Ordered that the said reply be filed within ten days after the documents and records, or copies of same are furnished to the plaintiff, as ordered by this Court on this date.

Dated April 3, 1946.

CHASE A. CLARK,
United States District Judge.

Filed: April 3, 1946. [52]

[Title of District Court and Cause.]

STIPULATION

It is stipulated by and between the parties to this action by and through their counsel of record, as follows: That

I.

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
	Total	\$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
	37.70	
	Grand Total	\$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement, is as follows, on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		\$ 236,813.40
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	\$1.87
	O. D. .....	.21
		2.08
WSLG-863387	The Travelers Insurance Company .....	.13
	Total	2.21
	Grand Total	\$ 246,126.56

The aforesaid total premium of \$246,126.56 represents the earned premiums on a retrospective basis under War Projects Insurance Rating Plan; that said figure is still subject to final adjustment.

That the premium for Workmen's Compensation and occupational disease as reported to the Industrial Accident Board of the State of Idaho and tax paid on \$449,556.01 for the period July 1, 1942, to December 31, 1942, and that tax was paid on [54] the amount of \$171,492.41 for the period January 1, 1943, to June 30, 1943, and that report was made to the Industrial Accident Board for the period July 1, 1943, to December 31, 1943, of return premiums in the sum of \$439,417.90 and that on February 26, 1943, the Travelers Insurance Company reported to the Director of Insurance and paid the 3 per cent tax to him on accident, health, personal liability, and workmen's compensation in the sum of \$558,994.21 for the year 1942, and that various reports were made to the Industrial Accident Board of the State of Idaho showing for the years 1942, 1943 and 1944 premiums of \$727,524.30 less return of \$439,417.90. Tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported. No refund of tax has been made by the Industrial Accident Board or by the Bureau of Insurance of the State of Idaho on account of the return of premiums reported by the defendants. No action has been commenced by the defendants nor have any court proceedings been taken by the defendants therein since the tax payments were made. The defendants' letter of February 8, 1944, to the Industrial Accident Board informed the Board of the amount of return of premium in the sum of \$439,417.90 for the period

of July 1, 1943, to December 31, 1943, and requested the Board to advise the Company of the procedure to follow in order to obtain the tax refund of \$4391.18. The defendants' letter of February 28, 1944, to the Director of Insurance informed the Director of the amount of return of premium in the sum of \$273,871.95 for the year of 1943 and requested the [55] Director to advise the defendants of the procedure to follow in order to obtain the tax refund of \$8216.16.

II.

The earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, the Travelers Indemnity Company \$3.43; that the earned premium on Policy UB-908556 earned by the Travelers Insurance Company was \$99.45.

III.

Total premiums paid by the Walter Butler Company to The Travelers on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement

Deposit Premium	\$ 47,519.66
Total Audit Premium (includng Washington)	647,323.06
	694,842.72
Less Washington Premium..	18.85
	\$694,823.87
Total Amount of Return Premium (Subject to final adjustment)	448,699.52
Net amount of Earned Premium (Idaho only).....	\$246,124.35
Amount of Premium on which Taxes were paid on Polices issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan endorsement	

	Premiums on Which Taxes Were Paid	Refund Claimed	Total Premium as figured under War Projects Insurance Rating Plan
(1) Workmen's Compensation	\$535,599.84	\$291,071.36	\$244,528.48
(2) Automobile Bodily Injury	1,238.24	117.05	1,121.19
(3) Liability other than automobile	31,246.08	26,339.59	4,906.49
(4) Automobile Property Damage (Travelers Indemnity Co.)	3,281.38	.....	3,281.38
	<hr/>	<hr/>	<hr/>
	\$571,365.54	\$317,528.00	
The Travelers Insurance Co. Items			
(1), (2), and (3).....		\$250,556.16	
The Travelers Indemnity Co. Item			
(4)		3,281.38	
	<hr/>	<hr/>	<hr/>
Total Premiums			\$253,837.54*

*Defendants assert that a further sum is to be refunded so as to make the earned premium paid and payable on which the Idaho premium taxes must be paid \$246,124.35.

Premiums and Taxes on the UB and HPS policies not issued under the War Projects Insurance Rating Plan

	Premium	*Taxes 3%	**Taxes 1%
UB-908556			
Workmen's Compensation	\$99.45	\$2.98	\$.99
HPS-908556			
Bodily Injury Liability.....	11.10	.33	.....
Property Damage Liability.....	3.43	.10	.....

*Taxes paid to Idaho Insurance Department.

**Taxes paid to Industrial Accident Board.

IV.

It Is Stipulated that the written data furnished plaintiff by the defendants on plaintiff's motion for inspection, or duplicates thereof, or the instruments

from which the copies were made, may be offered in evidence by any party hereto as genuine and in lieu of the original, subject to any other objection as to admissibility.

It Is Further Stipulated that in the event the written data furnished plaintiff on plaintiff's motion for inspection or duplicates thereof, or the copies from which they were made, are admitted in evidence, a written memorandum explaining how said admitted documents may be used to show the premiums paid may be admitted in evidence. The witness preparing the written statement to be present and subject to plaintiff's examination thereon.

V.

It Is Further Stipulated That the War Projects Insurance Rating Plan for Cost-Plus-Fixed-Fee Contract, a copy of which [57] has heretofore been served upon the plaintiff in response to plaintiff's request for admission, is true and genuine, and that said plan may be offered in evidence, subject to plaintiff's right to object as to the legality of the use of said plan in the State of Idaho and as to the War Projects Insurance Rating Plan Endorsement being a part of the policies in question. It Is Further Stipulated that said plan was applied as to Policies Nos. WUB 863386, WSLG 863387, and WSLA 863388 under the Walter Butler contract involved herein for the construction of the Farragut Naval Station at or near Bayview, Idaho.

VI.

The audited interim premiums on the policies in-

volved herein in the amount of \$694,823.87 was actually paid to the defendants on account of the policies in controversy and that the defendants returned to Walter Butler Company the sum of \$440,985.33, under provisions of the War Projects Insurance Rating Plan claimed to be a part of the three policies first described in Paragraph I. That no court action was ever commenced against the State of Idaho to recover tax paid on returned premiums.

VII.

It Is Stipulated that the defendants, and each of them, are insurance companies incorporated under the laws of Connecticut, with their home office at Hartford, Connecticut, and engaged in the insurance business; that each of said companies at all times described in the pleadings herein was licensed to do business in the State of Idaho. [58]

VIII.

It Is Further Stipulated that Exhibit 1 attached to the defendants' Answer is a true and correct copy of a letter written by the defendants to Eugene H. Ware Co. on October 21, 1936, and received and accepted by Eugene H. Ware Co. on or about said date. That the original of said letter may be offered in evidence, or a copy thereof may be offered in evidence, without production of the original, subject to any objections as to its admissibility other than its genuineness and other than the fact that it is a copy.

IX.

Nothing in this stipulation shall prevent either

party from offering evidence otherwise admissible or explanatory of the matters stipulated herein not inconsistent with this stipulation.

Dated this 29th day of April, 1947.

EZRA R. WHITLA,
E. T. KNUDSON,
Attorneys for Plaintiff.

/s/ WM. S. HAWKINS,
C. H. POTTS,
By WM. S. HAWKINS.
/s/ CHARLES HOROWITZ,
Attorneys for Defendants.

Filed April 30, 1947. [59]

[Title of District Court and Cause.]

OPINION

Clark, District Judge.

September 15, 1947.

One Eugene H. Ware, an Insurance Agent doing business in Kootenai County, Idaho, brought this action against the defendants alleging that he was the duly appointed agent of the defendant companies and licensed by them. That he was duly qualified, licensed resident insurance agent of the State of Idaho and further alleges that he, Ware, entered into a written contract as resident agent of the defendant Companies, which contract is set forth in full as exhibit A attached to plaintiff's com-

plaint. The Contract is in the usual form of agency contract and provides for the payment of certain commissions on risks written or renewed by him during the continuance of the contract. The contract also provided that said Ware was authorized to countersign policies of insurance, renewal receipts, certificates and endorsements pertaining to the lines of insurance covered by the contract unless otherwise advised, and further alleges that under the laws of the State of Idaho, plaintiff [60] was entitled as such resident agent to the commission as provided in said contract, on all policies written by the Companies and each of them and submitted to the plaintiff for countersignature as resident agent of the said Companies. It is not necessary to set the contract forth in full.

The plaintiff Ware, in addition to the written contract, had a separate arrangement with the defendant companies that he would act as countersigning agent for the agreed compensation of \$5.00 per month. The said Ware placed insurance for the defendant companies under his written contract and also acted as countersigning agent on insurance that was obtained by the head office of the defendant companies during the time he was acting as agent.

There are two separate contracts. First; the written contract which applies to proposals of insurance secured by the agent and placed by him. Second; The contract that provided that the defendant would pay Mr. Ware \$5.00 per month as countersigning agent for the defendant Companies.

This action was originally before the Court on a motion to dismiss the complaint on the ground that it did not state a claim against the defendant Companies and at the time of the argument on this motion it was contended by the plaintiff that he did not rely upon the written contract for the recovery sought but relied exclusively upon section 40-902 Idaho Code Annotated, which provides as follows:

“Foreign companies — Resident agents — Countersigning policies.

It shall be unlawful for any foreign Insurance Company doing business in this State to make, write, place or cause to be made, written or placed in this State any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life [61] insurance) and shall receive the full commission when the premium is paid, to the end that the state may receive the tax required by law to be paid on the premiums collected for insurance on all persons and property resident or located within this state: Provided, this section shall not apply to life insurance companies.”

And under the amendment set forth in the 1939 Session laws of the state of Idaho at page 109 which reads as follows:

Section 40-902. Foreign Companies—Resident Agents—Countersigning policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premiums is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * Provided, this section shall not apply to life insurance companies.

Contending under these provisions that Ware was entitled to the full commission on any policies countersigned by him as resident agent in the State of Idaho. This Court sustained the motion of the defendant to dismiss on the ground "that the statute upon which this action is based is repugnant to the 14th amendment of the Constitution and is also an unconstitutional restriction upon Interstate Commerce." This case was appealed to the Circuit Court of Appeals of the 9th Circuit and this Court was re-

versed. Ware v. Travelers Insurance Companies 150 Fed. (2) 463.

The Circuit Court of Appeals in that decision passed only upon the constitutional question and held that the statute was valid and was well within the power of the state over insurance companies against local risks and the case was returned to this Court for further proceedings. In the meantime Eugene H. Ware dies and Mary Broderick administratrix [62] with will annexed of the Estate of Eugene H. Ware deceased was substituted as plaintiff. Answer was filed admitting Eugene H. Ware was a citizen and resident of Coeur d'Alene, Idaho; admitting the corporate capacity of the defendant companies; admitting that Mr. Ware, during his lifetime was a duly qualified and licensed insurance agent according to the laws of Idaho; admitting that the defendant companies caused said Ware to be duly licensed as their resident agent in the State of Idaho and caused a certificate of his appointment to be made and delivered to him; admitting the written contract set forth as exhibit "A" and "A-1", but alleging that the insurance policies in question here were written and placed by the defendant companies under what is known as the War Projects Rating plan and countersigned by Ware as its countersigning agent in accordance with the contract under which he was to receive \$5.00 per month.

It is agreed by the plaintiff that the policies were not written under the written contract, and plaintiff relies exclusively on the Statute for recovery, so the facts as presented to the Court are:

The defendants had an arrangement with Mr. Ware to act as countersigning agent for an agreed sum of \$5.00 per month; they forwarded him three policies, No. 863386; No. WSLC-863387 and No. WSLA-863388.

The breakdown of the final premium developed under these policies in accordance with the War Projects Insurance Rating Plan, sometimes referred to as the comprehensive Insurance rating plan endorsement, is as follows, on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61
		\$ 236,813.40
WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37
	Total	\$ 246,124.35

The proposals for these policies were received at the Home office; were written there and sent to Ware for countersigning. Mr. Ware countersigned them and returned them to the Home Office for delivery. Plaintiff prays judgment for ten (10%) per cent of the premium paid.

If Ware was to receive this commission it must be found that he was entitled to it as a matter of law as the plaintiff's right is wholly dependant on the Statute:

The Statute provides: "it shall be unlawful for any foreign insurance company doing business in this State to make, write, place or cause to be made written or placed in this State any policy or contract, duplicate policy or contract of insurance of any kind or character or any bond, duplicate policy or contract of insurance of any kind or character or any general or floating policy upon persons or property, unless done through an agent who is a resident of this State legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid. Provided this section shall not apply to Life Insurance Companies. (The part underlined is the amended portion of the Statute and plaintiff alleges in his complaint that the policies "were submitted to the plaintiff by the defendants and not through a licensed broker," and agrees that the amended portion of the statute has no application here.)

At the very onset counsel for the defendants again raised the constitutionality of the Statute. It is not necessary to discuss this as the decision of the Court of Appeals establishes the law of the case because it is well settled that a decision of the higher Court upon a point distinctly [64] made an

essential to its determination on a previous appeal is in all subsequent proceedings in the same case a final adjudication, so the case will be considered by the Court on the theory that the law of the case has been decided. However, the contention of the plaintiff that the case was fully decided in that decision is, in this Court's opinion, an incorrect interpretation of the decision of the Court of Appeals, as the Court said on page 464 of that opinion (which is entitled *Ware v. Travelers Insurance Co.*, 150 Fed. (2) 463).

"Appellees contend that the Idaho Statute has no application to the policies and bonds written in this instance, inasmuch as they were not negotiated or written in Idaho. They say, too, that the phrase 'full Commission' has no meaning as applied to a situation where no agent has received a commission. They argue further that the statute is not to be read into Ware's contract; and that assuming a right of recovery is intended to be conferred on the agent, nevertheless the right may be waived, and in this instance impliedly was waived by Ware in his contract with the Companies. However, the court below did not rule on these questions and we do not feel called upon to decide problems of local law of such consequence without benefit of the contribution which the Federal Judge in Idaho is in position to make. Moreover, the questions may more intelligently be considered in the light of all the facts as disclosed in the course of a trial."

It will be noted therefore that the Court only passed on the constitutionality of the Statute and was not passing on the statute in the light of the evidence introduced in this case. While this Court is under obligation to follow the law of the case as to the constitutionality of Section 40-902 Idaho Code Annotated, it still remains for the Court to determine whether under the Statute, the plaintiff is entitled to recover in this case.

If the right to recover exists *in* must be found that it exists under the Statute alone, independent of the agency contract held by Ware, as it is agreed that this action is prosecuted, not on the contract, but on the statute. [65]

The first question then to consider is: Does the Statute, under the facts here, entitle the plaintiff to the relief prayed for? The Court will not consider whether there is a right of recovery for the countersigning service rendered by Eugene H. Ware under the provisions of the agency contract dated October 1, 1936 as that is not before the Court. The defendants acting independently of the contract obtained the proposals and placed the insurance. However, they were attempting not to violate the law, but to comply with its requirements. They forwarded the policies to Mr. Ware for countersignature; Ware would thereupon countersign the policies and return them to the defendants. The only compensation that Ware received for this countersigning was the agreed fee of five dollars per month.

This case had to be tried without the benefit of Mr. Ware's testimony but it does not appear in the

record where there was any other consideration agreed upon between the parties, except the agreed fee, which was regularly paid. There is nothing in the evidence to indicate that Ware was to receive any special commission for approving and countersigning the so-called home office policies. There is no contract in existence here between Ware and the defendants for a stipulated commission. There is no Statute in the State of Idaho that enlarges the stature now before the Court, or is helpful in determining the rights of the insurance agent where the statute above quoted is violated. The legislature has not seen fit to fix any mandatory commission that must be paid to agents in the state in placing or signing foreign companies' policies doing business in this State. As far as the statute goes it makes it unlawful for a foreign company to "make, write, place or cause to be made or placed in this state" any insurance unless it is [66] done through an agent who is a resident of the State. This part of the Statute has been complied with. It is not necessary to spend time on the words "make, write, place or cause to be made, written or placed in this state" as I feel it is immaterial here. However, the final act in executing this contract was the countersigning of it by Mr. Ware. The risk covered by the insurance was located within the State of Idaho, so I think it can safely be said at least that the contract was written and placed within the State. This being so, it was necessary that the defendant companies should pay the full commission when the premiums were paid, to the Idaho agent. In this

case it is apparent that no commission was paid, so there is no basis upon which to arrive at the amount that would be due Ware, except the statement that ten per cent was generally considered the commission to be paid. However it must be remembered that under the Idaho law there is nothing to prevent an agent from contracting on the amount of commission that he sees fit to receive for his services. He is not prohibited from contracting for one per cent commission or a twenty per cent commission. The Insurance Company is prohibited however from paying any commission outside of the State. There was nothing unlawful in Mr. Ware making the contract with the defendant companies that he would countersign the policies at five dollars per month.

The Court cannot write remedies into the statute which are not specifically mentioned.. It cannot be said that an agent is specifically given, under this section of the statutes, a right of action to recover and if the statute was to be so construed, that he does have a right of action, his right to recover is limited to the full commission that was paid to out of state agents in writing the policies.

It is unfortunate in the Court's opinion that the Statute does not cover the case now before this Court. In a [67] proper action it might be said that the war rating plan, under which the insurance involved in this action was written, was not permissible under the Statute of Idaho. It seems without question that the plan was set up with the thought in mind of avoiding the payment of commissions, but regardless of that fact the Court is unable, after

reading the statute into and making it a part of the contract, which provides that he shall have the full commission when the premium is paid, determine what, if any, commission could be allowed when no commission is agreed upon and no commission is paid.

In viewing this statute I am taking the position that the Insurance Company in all its operations is subject to the regulations of the state as to rates, agency contracts and terms of the policy, and when the legislature has acted upon these matters they become public policies of the State and cannot be departed from by the parties. I agree that they cannot be waived, and that the public policy cannot be departed from. If an agent's commission was fixed by law it cannot be waived. If there was any commission paid there can be no compromise, it must be paid to the agent in full. It is a declaration of the public policy of this State and binding upon all of the parties, but applying the statute to the facts of this case and making it a part of the contract under which Ware countersigned the policies in question; I find that Section 40-902 of the Idaho Code Annotated is constitutional and valid and that the opinion of the Circuit Court of Appeals, Ninth Circuit, is final on this question.

I find that there was no commission paid outside the State of Idaho.

I find that there is no right to recover for the countersigning service by Eugene H. Ware. [68]

I find that Ware has been paid for such services under his agreement to accept the \$5.00 per month therefore.

I find that there was no commission fixed by the Statute or otherwise to be paid Mr. Ware on the insurance here involved.

I find that the customary commissions paid on similar policies form no basis for fixing commissions in this case.

I can find no provision that would permit this Court to fix the amount of commission that should be paid Mr. Ware or any provision of the statute that applies to the facts in this case and recovery must be denied.

Filed Sept. 16, 1947. [69]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of the above entitled cause having come on regularly to be heard April 28, 1947, before the above entitled court sitting at Coeur d'Alene, Idaho, and the taking of evidence having been concluded on May 1, 1947, the plaintiff appearing by Messrs. Whitla & Knudson, her attorneys, the defendants appearing by Wm. S. Hawkins, C. H. Potts, and Charles Horowitz of the firm of Preston, Thorgrimson & Horowitz, the case having thereafter been continued for oral argument to May 28, 1947, after oral argument the court having ordered the filing of briefs by each of the parties hereto, thereafter, after the filing of said briefs, the court having rendered a memorandum opinion under date of September 15,

1947, finding for the defendants and against the plaintiff, the court now enters its following

FINDINGS OF FACT

I.

That at all times herein mentioned prior to his death, plaintiff Eugene H. Ware was a citizen and resident of Coeur [70] d'Alene, Kootenai County, Idaho, and the defendants The Travelers Insurance Company and the Travelers Indemnity Company, and each of them were at all times herein mentioned corporations organized and existing under and by virtue of the laws of the State of Connecticut and doing business in the State of Idaho. That Mary Broderick, at the time of the commencement of the trial of the above entitled cause and at all times since, is the duly acting and qualified administratrix with will annexed of the Estate of Eugene H. Ware, deceased, substituted as plaintiff herein. That the amount in controversy in this action exceeds the sum of \$3,000, exclusive of interest and costs.

II.

The plaintiff Eugene H. Ware, also known as E. H. Ware, since January 1, 1936, and during his lifetime, was a duly qualified and licensed insurance agent according to the laws of the State of Idaho, residing in Coeur d'Alene, Kootenai County, Idaho. That said Eugene H. Ware individually also did business as "Eugene H. Ware Co." or "Eugene H. Ware Company." That the defendants caused the said Eugene H. Ware to be duly licensed as their resident agent in the State of Idaho and caused a

certificate of said appointment to be made and delivered to the said Eugene H. Ware.

III.

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants as set forth in Exhibits A and A-1 to the complaint, and that such contract was amended subsequently as stated in Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, and A-9 to said complaint. That said exhibits read as follows: [71]

[Exhibit A—Page.....	16
A-1—Page.....	22
A-2—Page.....	23
A-3—Page.....	24
A-4—Page.....	25
A-5—Page.....	26
A-6—Page.....	27
A-7—Page.....	28
A-8—Page.....	29
A-9—Page.....	30]

* * * * *

IV.

That at all times since December 5, 1940, during the lifetime of the said Eugene H. Ware, the said Eugene H. Ware and Evelyn Thomas, an employee of the plaintiff, were appointed by the Travelers Indemnity Company its true and lawful attorney-in-fact and with full power and authority for and on behalf of said company as surety to execute and deliver and affix the seal of the company thereto to bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding the amount of \$100,000 in any single instance, under

and by virtue of a written instrument dated December 5, 1940, executed by said The Travelers Indemnity Company, a copy of such instrument, marked "Exhibit B" being attached to the complaint.

V.

That defendants The Travelers Insurance Company and the Travelers Indemnity Company are corporations owned, [81] managed and controlled by the same persons, and that they, with other companies, constitute what is generally known as "The Travelers Line," writing various kinds of insurance, and said business is done largely through the same agents. That the business activities of the defendants are jointly conducted and operated substantially as one business. That the Travelers Insurance Company and the Travelers Indemnity Company were at all times herein mentioned and are licensed to do business in the State of Idaho and to write the various types of insurance and to execute the instruments here involved to which they are signatories.

VI.

That Walter Butler Company is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota. That prior to the issuance of the hereinafter described insurance policies (said policies being described in the complaint), said Walter Butler Company entered into a cost-plus-a-fixed-fee contract with the U.S. Navy (the performance of which was under the jurisdiction of the Bureau of

Yards and Docks of the U. S. Navy) for the construction of the Farragut Naval Station at or near Bayview within the State of Idaho. That in connection with said contract the Bureau of Yards and Docks of the U. S. Navy required the hereinafter described insurance coverage, the cost of such coverage to be paid for under the terms of the aforesaid cost-plus-a-fixed-fee contract. That said insurance coverage so required was coverage to be issued under order of said Bureau of [82] Yards and Docks, originally designated under the name of "Comprehensive Insurance Rating Plan for National Defense Projects" and later designated as "War Projects Insurance Rating Plan." By the terms of the aforesaid Plan, insurance of specified character was required to be issued on a retrospective insurance premium basis that would reflect only the following items of cost:

- (a) A fixed charge to meet the administrative cost of the insurance carrier exclusive of claim administrative cost and to meet losses in excess of the maximum premium.
- (b) Losses Incurred.
- (c) A charge of 12% of the losses to take care of administrative claim requirements other than "allocated claim expenses."
- (d) Allocated claim expenses.
- (e) State taxes payable by the insurance carrier on such premiums.

The premiums so determined were in all instances subject to a maximum premium. The maximum

premium and the fixed charge premium were percentages of the standard premiums developed under the insurance policies in accordance with their terms exclusive of the Comprehensive Insurance Rating Plan endorsement.

That the aforesaid plan made provision for the selection and use by a contractor of an insurance advisor and for the payment by the contractor, and only by the contractor for the services of such advisor. That said Plan expressly prohibited the insurance carrier from paying anything whatsoever to such insurance advisor for services rendered by him, that the aforesaid Plan did not contemplate and provision was not made therein for the payment of commission to an agent or broker by the insurance carrier. That by the terms of the aforesaid Plan the Comprehensive Insurance Rating Plan Endorsement was issued and formed a part of insurance policies issued under such Plan.

That pursuant to the aforesaid Comprehensive Insurance Rating Plan said Walter Butler Company caused to be made, written and placed in the State of New York through Acme Brokerage Corporation, the insurance advisor of Walter Butler Company, the following insurance policies:

Policy WUB-863386 being standard workmen's compensation and employers' liability policy issued by The Travelers Insurance Company; Policy WSLG-863387 being comprehensive general liability policy issued by The Travelers Insurance Company; and Policy WSLA-3863388, being comprehensive automobile liability policy issued by The Travelers

Insurance Company and The Travelers Indemnity Company. That the aforesaid Policy WSLG-863387 is a severally issued policy which carries the name of both The Travelers Insurance Company and The Travelers Indemnity Company. However, The Travelers Insurance Company was the only insurer with respect to the coverage afforded under said Policy WSLG-863387. The Policy WSLA-863388 is also a severally issued policy carrying the names both of The Travelers Insurance Company and The Travelers Indemnity Company. Under its terms the Travelers Insurance Company was the insurer with respect to Coverage A, being bodily injury liability, and The Travelers Indemnity Company was the [84] insurer with respect to Coverage B, being property damage liability. The aforesaid policies were written for the period from April 28, 1942, to April 28, 1944. The effective date of these policies was subsequently changed by endorsement to April 10, 1942. The policies were all cancelled effective July 30, 1943, the project having been completed before that date.

That in addition to the aforesaid policies The Travelers Indemnity Company caused to be issued to the Walter Butler Company in connection with the aforesaid naval construction project Idaho Compensation Surety Bond No. 2873. Said bond was issued pursuant to the requirements of subsection 2 of section 43-1601 of the Idaho Workmen's Compensation Law and covered the liability for workmen's and occupational disease compensation all as hereinabove set forth. No premium was charged the

insured for the Compensation Surety Bond, the bond being an undertaking between The Travelers Insurance Company and The Travelers Indemnity Company, and no commission was paid by the defendants to anyone in connection therewith.

The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premium shown in the policies and without the application of the Comprehensive Insurance Rating Plan Endorsement were as follows: [85]

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
	Total	\$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		37.70
	Grand Total	\$1,294,646.12

The breakdown of the final premium developed under these policies in accordance with the Comprehensive Insurance Rating Plan Endorsement is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation	\$236,364.79
	O. D.	448.61

WSLG-863387	The Travelers Insurance Company	4,908.39
WSLA-863388	The Travelers Insurance Company	1,121.19
	The Travelers Indemnity Company	3,281.37

	Total	\$ 246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation.....	1.87
	O. D. ....	.21

WSLG-863387	The Travelers Insurance Company	1.13

	Total	3.21

	Grand Total	\$ 246,127.56

The aforesaid total premium of \$246,127.56 represents the earned premiums on a retrospective basis in accordance with the terms of said insurance policies, as required by the Bureau of Yards and Docks of the U. S. Navy; that no commission was payable or paid by the defendants to any agent or

broker for the placing of the aforesaid business with the defendants; that no commission was payable or paid by the defendants to any agent or broker for any other services in connection with the aforesaid business with the defendants except such amount as was paid to Eugene H. Ware for his countersigning service; that Eugene H. Ware's services were confined to the simple formal act of countersigning the aforesaid policies and bond when sent to him by mail for countersignature and by mail forwarding the policies to the defendants in New York in May, 1942, and by mail forwarding the bond to the Industrial Accident Board of Idaho. That no commission was fixed or payable as provided in Exhibit A-2 of the contract attached to the complaint (dealing with the risks written on a retrospective basis) the individual risks involved calling for no payment of commissions under the terms of the aforesaid Comprehensive Insurance Rating Plan. The Court makes no finding as to whether this plan was permissible under the laws of the State of Idaho.

VII.

That Policy HPS-908557, naming the Travelers Insurance Company as insurer with respect to bodily injury liability, and naming The Travelers Indemnity Company as insurer with respect to property damage liability, was issued to the Walter Butler Company, covering certain liability in connection with the Bozanta Tavern located near Hayden Lake, Idaho. That Workmen's Compensation and Employers' Liability. [87] Policy UB-908556, naming The Travelers Insurance Company as in-

surer with respect to such liability, covered certain liability in connection with the Bozanta Tavern near Hayden Lake, Idaho. That each of said policies were submitted for countersignature to Eugene H. Ware in Coeur d'Alene, Idaho, in February, 1943, and by the said Eugene H. Ware there countersigned. That premiums for each of said policies were paid to the defendants through Acme Brokerage Corporation of New York, N. Y., who placed said insurance business with the defendants in New York. That the earned premium paid under Policy HPS-908557 was as follows: The Travelers Insurance Company, \$11.10; The Travelers Indemnity Company, \$3.43. That the earned premium paid on Policy UB-908556, earned by The Travelers Insurance Company, was \$99.45.

VIII.

That none of the aforesaid five policies was written under the contract described in paragraph III hereof. That none of said policies was written pursuant to proposals secured by Eugene H. Ware. That plaintiff alleges in the complaint that the policies involved were "submitted to the plaintiff by the defendants and not through a licensed broker."

IX.

That on or about October 1, 1936, Eugene H. Ware entered into a written contract with the defendants, as found by Paragraph III of these findings of fact. That on or about October 21, 1936, the said Eugene H. Ware entered into a valid supplemental agreement with the defendants by [88]

the terms of which defendants agreed to pay to the said Eugene H. Ware and Eugene H. Ware agreed to accept a monthly remuneration of \$5.00 for countersigning insurance policies issued by defendants on Idaho risks in the case of proposals for insurance secured outside the state and not secured by Eugene H. Ware. That the aforesaid contract and supplemental agreement thereafter continued in full force and effect and the countersigning services rendered by Eugene H. Ware were rendered under and pursuant to the aforesaid contract and supplemental agreement. That the said Eugene H. Ware has been paid in full by defendant for the countersigning services by him rendered.

X.

That at the time of the issuance of the policies hereinabove mentioned there was in full force and effect Section 40-902 of Idaho Code Annotated as amended by Chapter 61, Laws of 1939, p. 109, reading as follows:

“Foreign Companies — Resident Agents — Countersigning Policies. It shall be unlawful for any foreign insurance company doing business in this state to make, write, place or cause to be made, written or placed in this state any policy, bond, duplicate policy or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident, situated or located in this state, unless done through an agent who is a resident of this state, legally commissioned and licensed to

transact insurance business therein. A resident agent shall countersign all policies so issued (except policies of life insurance) and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the countersigning agent shall receive a commission of not less than five per cent of the premium paid: * * * provided this section shall not apply to life insurance companies." [89]

That the constitutionality of the aforesaid statute was passed upon by the Circuit Court of Appeals for the Ninth Circuit in the case of Ware vs. Travelers Ins. Co. et. al., 150 F. (2d) 463.

XI.

That at and prior to the date when the policies here involved were countersigned, the defendants were foreign insurance companies licensed to do business in the State of Idaho and engaged in interstate commerce, both with respect to making, writing and placing of insurance policies and the servicing of the same. That the making, writing and placing of the insurance policies and instruments here involved were in the course of and constituted an act in interstate commerce. That under the provisions of the aforesaid statute of Idaho, no service whatsoever was required of a countersigning agent except the simple, ministerial act of countersignature. That Eugene H. Ware in fact rendered no service whatsoever to the defendants or anyone else except as hereinabove mentioned.

XII.

That the aforesaid statute applies only to foreign insurance companies and not to domestic companies. That during the time that the instruments in question were made, written and placed, there existed in active business and in active competition with the defendants in Idaho a domestic insurance company of Idaho, namely, the Idaho Compensation Company, to whom the aforesaid statute did not apply.

XIII.

That under the law of Idaho, compensation payable by an insurance company to an insurance agent for services rendered or to be rendered by him for securing proposals for insurance are customarily fixed by contract between the insurance carrier and the insurance agent, on terms and conditions mutually satisfactory to each, and such contract governs the rights of the parties thereto.

Done in pen Court this 27th day of October, 1947.

CHASE A. CLARK,
District Judge.

From the foregoing Findings of Fact, the Court enters its following

CONCLUSIONS OF LAW

I.

The Idaho statute (Section 40-902 as amended), as set out in the Findings of Fact aforesaid, is, under the doctrine of the law of the case, constitutional.

II.

The Idaho Statute (Section 40-902 as amended), as set out in the Findings of Fact aforesaid, contains no provision fixing the amount of commission that should be paid to the plaintiff for countersigning services rendered by him, nor does any provision of said statute apply to the facts in this case so as to permit recovery, and customary commissions, if any, paid on insurance [91] proposals secured in Idaho by Idaho agents form no basis for fixing commissions to the plaintiff in this case.

III.

The plaintiff has been paid for the countersigning services rendered under the agreement of Eugene H. Ware to accept \$5 per month therefor.

IV.

Defendants are entitled to a judgment of dismissal with prejudice and with costs.

Done in Open Court this 27th day of October, 1947.

CHASE A. CLARK,
District Judge.

Filed Oct. 27, 1947. [92]

[Title of District Court and Cause.]

DECREE AND JUDGMENT

Trial of the above entitled cause having come on regularly to be heard April 28, 1947, before the

above entitled court sitting at Coeur d'Alene, Idaho, and the taking of evidence having been concluded on May 1, 1947, the plaintiff appearing by Messrs. Whitla & Knudson, her attorneys, the defendants appearing by Wm. S. Hawkins, C. H. Potts, and Charles Horowitz of the firm of Preston, Thorgrimson & Horowitz, the case having thereafter been continued for oral argument to May 28, 1947, after oral argument the court having ordered the filing of briefs by each of the parties hereto, thereafter, after the filing of said briefs, the court having rendered a memorandum opinion under date of September 15, 1947, finding for the defendants and against the plaintiff, the court having entered its findings of fact and conclusions of law, and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the above entitled cause, action and complaint be and the same are hereby dismissed with prejudice and with costs to the defendants.

Done in Open Court this 27th day of October, 1947.

Presented by:

CHASE A. CLARK,

District Judge.

WM. S. HAWKINS and

CHARLES HOROWITZ,

Attorneys for Defendants.

(Entered in Civil Docket Oct. 27, 1947.) [93]

Filed Oct. 27, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mary Broderick, Administratrix with the Will Annexed, of the estate of Eugene H. Ware, deceased, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 27th day of October, A.D., 1947, denying the plaintiff recovery and ordering that the Complaint be dismissed with prejudice to the defendants.

Dated this 24th day of January, A.D., 1948.

EZRA R. WHITLA,
E. T. KNUDSON,

Attorneys for Appellant, residence and P.O. Address, Coeur d'Alene, Idaho.

(Copies of above Notice mailed to C. H. Potts, Wm. S. Hawkins and Charles Horowitz, by the Clerk on Jan. 24, 1948.

Filed Jan. 24, 1948. [94]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

This Cause came regularly on for hearing before the Honorable Chase A. Clark, sitting without a jury, at Coeur d'Alene, April 30th, 1947.

Appearances

Ezra Whitla, of Coeur d'Alene, Idaho; and E. T. Knudson, of Coeur d'Alene, Idaho; Attorneys for the Plaintiff. [95]

William S. Hawkins, of Coeur d'Alene, Idaho; C. H. Potts, of Coeur d'Alene, Idaho; and Charles Horowitz, 2000 Northern Life Tower, Seattle, Wash.; Attorneys for the Defendant.

G. C. Vaughan, Official Reporter, Boise, Idaho.

April 30th, 1947, 10:00 A.M.

Mr. Whitla: If the Court please, it has been agreed between counsel that Mary Broderick is the duly qualified and acting Administratrix, With the Will Annexed, of the estate of Eugene H. Ware.

Mr. Horowitz: That is correct.

The Court: And she is now substituted as party plaintiff here?

Mr. Whitla: That is right.

The Court: Very well. That may be understood.

Mr. Whitla: There are a number of records that were furnished here, in fact a very large amount of these records, and there are some that we do not want to introduce in evidence, and some that we do not want to be bound by. Some of them I shall not object to their going in, but I will not introduce them myself, and there are others that I will have an objection to their materiality.

The Court: You may make your offer; after these records are identified you may point out for

the record the part of any exhibit which you are not introducing.

Mr. Whitla: Very well. And there is a stipulation of facts prepared and filed in this case. This stipulation [100] shows the premiums developed and paid in accordance with the regular standard rates, and also under what is called the War Project Rating Plan, and what it would amount to, and there are other matters, such as matters of refunds, and requests for refunds of taxes—

The Court: Let me ask you, gentlemen: Isn't there just one question involved here, and that question, What was actually paid in commissions outside of the state of Idaho? In case the plaintiff is entitled to recover, Mr. Whitla, it would be immaterial what the regular rate was, or what the War Project Risk Rate was. The question is under the statute as to the actual commissions paid outside of the State of Idaho, at least that is the Court's view at this time.

Mr. Horowitz: There are five policies involved here. Three were written under the War Project Rating Plan, and there is no provision for commission on those. The last two, in 1943, did carry a very small amount of commission, which will be shown.

The Court: Without passing on the question at this time, and, of course basing my opinion on what has been before the Court on previous occasions, I cannot see where there is any necessity of proof of anything here except what commissions were paid,

if there were any paid, to anyone for writing this insurance, and any that might have been paid outside of the state of Idaho.

Mr. Horowitz: The facts will show that there was no commission paid on these policies, but I think the issues will be a little broader than your Honor indicates.

The Court: You understand, of course, that the higher court has said that this Idaho statute was a good statute, and we must proceed under that. I am also wondering if at this time it would not be well to agree that the stipulation may be copied into the record at this point?

Mr. Horowitz: That is agreeable.

Mr. Whitla: Yes; it is agreeable with the plaintiff.

The Court: Very well. Then the Reporter may copy the stipulation into the record at this point.

“In the District Court of the United States for the District of Idaho, Northern Division. Civil Action No. 1562-N. Mary Broderick, Administratrix, with the Will Annexed, of the Estate of Eugene H. Ware, Deceased, Plaintiff, vs. The Travelers Insurance Company, a corporation of the State of Connecticut, and The Travelers [102] Indemnity Company, a corporation of the State of Connecticut, Defendants.

“It Is Stipulated by and between the parties to this action, by and through their counsel of record, as follows: That

“I.

“The standard premiums developed under these policies, i.e., the premium developed in accordance with the classifications and rates of premiums shown in the policies and without the application of the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement were as follows:

Policy No.	Company	Standard Premium
Idaho		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	\$1,200,211.06
WSLG-863387	The Travelers Insurance Company	74,460.10
WSLA-863388	The Travelers Insurance Company	13,768.80
	The Travelers Indemnity Company	6,168.46
	Total	\$1,294,608.42
Washington		
WUB-863386	The Travelers Insurance Company, Compensation and Occupational Disease	35.64
WSLG-863387	The Travelers Insurance Company	2.06
		37.70
	Grand Total	\$1,294,646.12

“The breakdown of the final premium developed under these policies in accordance with the War

Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement, is as follows on the basis of an evaluation of losses as of September 28, 1945.

Policy No.	Company	Earned Premium
Idaho		
WUB-863386	The Travelers Insurance Company Compensation ..	\$236,364.79
	O. D.	448.61
WSLG-863387	The Travelers Insurance Company ..	\$236,813.40
	.....	4,908.39
WSLA-863388	The Travelers Insurance Company ..	1,121.19
	The Travelers Indemnity Company ..	
	.....	3,281.37
	Total	\$246,124.35
Washington		
WUB-863386	The Travelers Insurance Company Compensation..	\$1.27
	O. D. ....	.21
WSLG-863387	The Travelers Insurance Company	.13
	Total	2.21
	Grand Total	\$246,126.56

"The aforesaid total premium of \$246,126.56 represents the earned premiums on a retrospective basis under War [104] Projects Insurance Rating Plan; that said figure is still subject to final adjustment.

"That the premium for workmen's compensation and occupational disease as reported to the Industrial Accident Board of the State of Idaho and tax

paid on \$449,556.01 for the period July 1, 1942, to December 31, 1942, and that tax was paid on the amount of \$171,492.41 for the period January 1, 1943, to June 30, 1943, and that report was made to the Industrial Accident Board for the period July 1, 1943, to December 31, 1943, of return premiums in the sum of \$439,417.90 and that on February 26, 1943, the Travelers Insurance Company reported to the Director of Insurance and paid the 3 per cent tax to him on accident, health, personal liability, and workmen's compensation in the sum of \$558,994.21 for the year 1942, and that various reports were made to the Industrial Accident Board of the State of Idaho showing for the years 1942, 1943 and 1944 premiums of \$727,524.30 less return of \$439,417.90. Tax was paid semi-annually to the Industrial Accident Board and annually to the Bureau of Insurance upon the basis of the amount of premiums for the period reported. No refund of tax has been made by the Industrial Accident Board or by the Bureau of Insurance of the State of Idaho on account of the return of [105] premiums reported by the defendants. No action has been commenced by the defendants nor have any court proceedings been taken by the defendants therein since the tax payments were made. The defendants' letter of February 8, 1944, to the Industrial Accident Board informed the Board of the amount of return of premium in the sum of \$439,417.90 for the period of July 1, 1943, to December 31, 1943, and requested the Board to advise the Company of

the procedure to follow in order to obtain the tax refund of \$4391.18. The defendants' letter of February 28, 1944, to the Director of Insurance informed the Director of the amount of return of premium in the sum of \$273,871.95 for the year of 1943 and requested the Director to advise the defendants of the procedure to follow in order to obtain the tax refund of \$8216.16.

“II.

“The earned premium under policy HPS-908557 was as follows: The Travelers Insurance Company \$11.10, the Travelers Indemnity Company \$3.43; that the earned premium on Policy UB-908556 earned by the Travelers Insurance Company was \$99.45.

“III.

Total premium paid by the Walter Butler Company to The Travelers on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan Endorsement

Deposit Premium	\$ 47,519.66
Total Audit Premium (including	
Washington)	647,323.06

	694,842.72
Less Washington Premium..	18.85

	\$694,823.87
Total Amount of Return Premium (Subject to final	
adjustment)	448,699.52
Net amount of Earned Premium (Idaho only).....	\$246,124.35

Amount of Premium on which Taxes were paid on Policies issued under the War Projects Insurance Rating Plan, sometimes referred to as the Comprehensive Insurance Rating Plan endorsement

	Premiums on Which Taxes Were Paid	Refund Claimed	Total Premium as figured under War Projects Insurance Rating Plan
(1) Workmen's Compensation	\$535,599.84	\$291,071.36	\$244,528.48
(2) Automobile Bodily Injury	1,238.24	117.05	1,121.19
(3) Liability other than automobile	31,246.08	26,339.59	4,906.49
(4) Automobile Property Damage (Travelers Indemnity Co.)	3,281.38	.....	3,281.38
	<hr/>	<hr/>	<hr/>
	\$571,365.54	\$317,528.00	
The Travelers Insurance Co. Items			
(1), (2), and (3)			\$250,556.16
The Travelers Indemnity Co. Item			
(4)		3,281.38	
	<hr/>	<hr/>	
Total Premiums			\$253,837.54*

*Defendants assert that a further sum is to be refunded so as to make the earned premium paid and payable on which the Idaho premium taxes must be paid \$246,124.35.

Premiums and Taxes on the UB and HPS policies not issued under the War Projects Insurance Rating Plan

	Premium	*Taxes 3%	**Taxes 1%
UB-908556			
Workmen's Compensation	\$99.45	\$2.98	\$.99
HPS-908556			
Bodily Injury Liability.....	11.10	.33	.....
Property Damage Liability.....	3.43	.10	.....

*Taxes paid to Idaho Insurance Department.

**Taxes paid to Industrial Accident Board.

“IV.

“It Is Stipulated that the written data furnished plaintiff by the defendants on plaintiff’s motion for inspection, or duplicates thereof, or the instruments [108] from which the copies were made, may be offered in evidence by any party hereto as genuine and in lieu of the original, subject to any other objection as to admissibility.

“It Is Further Stipulated that in the event the written data furnished plaintiff on plaintiff’s motion for inspection, or duplicates thereof, or the copies from which they were made, are admitted in evidence a written memorandum explaining how said admitted documents may be used to show the premiums paid may be admitted in evidence. The witness preparing the written statement to be present and subject to plaintiff’s examination thereon.

“V.

“It Is Further Stipulated that the War Projects Insurance Rating Plan for Cost-Plus-Fixed-Fee Contract, a copy if which has heretofore been served upon the plaintiff in response to plaintiff’s request for admission, is true and genuine, and that said plan may be offered in evidence, subject to plaintiff’s right to object as to the legality of the use of said plan in the State of Idaho and as to the War Projects Insurance Rating Plan Endorsement being a part of the policies in question. It Is Further Stipulated that said plan was applied as to Policies Nos. WUB 863386, WSLG 863387 [109] and WSLA 863388 under the Walter Butler con-

tract involved herein for the construction of the Farragut Naval Station at or near Bayview, Idaho.

“VI.

“The audited interim premiums on the policies involved herein in the amount of \$694,823.87 was actually paid to the defendants on account of the policies in controversy and that the defendants returned to Walter Butler Company the sum of \$440,-985.33, under provisions of the War Projects Insurance Rating Plan claimed to be a part of the three policies first described in Paragraph I. That no court action was ever commenced against the State of Idaho to recover tax paid on returned premiums.

“VII.

“It Is Stipulated that the defendants, and each of them, are insurance companies incorporated under the laws of Connecticut, with their home office at Hartford, Connecticut, and engaged in the insurance business; that each of said companies at all times described in the pleadings herein was licensed to do business in the State of Idaho.

“VIII.

“It Is Further Stipulated that Exhibit I attached to the defendants’ Answer is a true and correct copy of a letter written by the defendants to Eugene H. Ware Co. on October 21, 1936, and received and accepted by Eugene H. Ware Co. on or about said date. That the original of said letter may be offered in evidence, or a copy thereof may be offered in evidence without production of the original, sub-

ject to any objections as to its admissibility other than its genuineness and other than the fact that it is a copy.

“IX.

“Nothing in this stipulation shall prevent either party from offering evidence otherwise admissible or explanatory of the matters stipulated herein not inconsistent with this stipulation.

“Dated this 29th day of April, 1947.

“Ezra R. Whitla, E. T. Knudson, Attorneys for Plaintiff; residence and P. O. Address: Coeur d'Alene, Idaho.

“Wm. S. Hawkins, Coeur d'Alene, Idaho; C. H. Potts, by Wm. S. Hawkins, Coeur d'Alene, Idaho; Charles Horowitz, 2000 Northern Life Tower, Seattle 1, Washington, Attorneys for Defendants.

“Of counsel: Preston, Thorgrimson, Horowitz & Turner, 2000 Northern Life Tower, Seattle 1, Washington.

“(Filed: U. S. District Court, District of Idaho, at 9:40 a.m., April 30, 1947, Ed M. Bryan, Clerk, by Betty Hill, Deputy.)”

Mr. Whitla: I am offering at this time Plaintiff's Exhibit No. 1, which is the policy of insurance, with all the riders and attachments, as furnished to us by the defendants in this case. As Plaintiff's Exhibit No. 1, we offer in evidence the policy of the Travelers Insurance Company of Hartford, Connecticut, No. WUB-863386, issued to Walter Butler Company, and I offer it, excepting therefrom, the certificate as to what it contains, which is put on the policy by the Assistant Secretary, apparently.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 1, for purposes of identification.) [112]

Mr. Horowitz: Your Honor will recall that we furnished copies of all documents, including copies of the policies. These copies were sent because we didn't have the originals. Many of the endorsements we can't locate. These copies were made from our original records, and are prepared to show the condition of the policy exactly. Now, if counsel is going to offer a copy of the physical instrument and leave off the Secretary's certificate showing what the instrument is, I will object. I don't quite know how your Honor wants to proceed with this, but if counsel wants to offer a part of these, then of course I will offer the balance.

The Court: It seems that the policy is what he asked for in his request to the defendants, and the policy would be what he is entitled to.

Mr. Whitla: And what I am offering, your Honor, is the policy with the endorsement specified on the face of the policy, and not what is in the certificate of the Assistant Secretary of the Company, and I am not offering the policy including that certificate.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 1, so marked for identification, was admitted in evidence.)

Mr. Whitla: This includes the policy, and also has [113] reference to the endorsements, but does

not include the insurance ratings. That is not described in the policy or included here. These are marked as Exhibits 1, 1-A, 1-B, 1-C and 1-D.

(Whereupon documents referred to were marked Plaintiff's Exhibits 1-A, 1-B, 1-C and 1-D for identification.)

Mr. Whitla: We now offer them in evidence. They are, again, 1, 1-A, 1-B, 1-C, and 1-D, inclusive.

The Court: They may be admitted.

(Whereupon Plaintiff's Exhibits 1-A, 1-B, 1-C and 1-D, for identification, were admitted in evidence.)

Mr. Whitla: I now have here a file of the report to the Industrial Accident Board. It begins with sheet which has been marked No. 40, and goes to sheet marked No. 62. I want to have this particular sheet, which is marked 52, marked as Plaintiff's Exhibit No. 2, and I will offer that in evidence.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 2, for purposes of identification.)

Mr. Whitla: It is simply the one sheet, 52.

The Court: Is there any objection?

Mr. Horowitz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 2, for identification, was admitted in evidence.) [114]

Mr. Whitla: This is the return of the company to the Industrial Accident Board for the period

of from July 1st, 1942, ending December 31st, 1942, and it shows a collection of premiums of \$449,-556.01, and it shows the amount due by computation in multiplying the net amount collected by the rate of one per cent, and shows the amount due to the Industrial Accident Fund of \$4,495.56. That is the amount of taxes due the fund. We offer this in evidence as Plaintiff's Exhibit No. 2.

The Court: I think it was already admitted.

Mr. Whitla: We offer at this time as Plaintiff's Exhibit No. 3, being page No. 36 of the report of the Industrial Accident Board for the six months period beginning January 1st, 1943, and ending June 30th, 1943. It shows the net premium collected on Workmen's Compensation Insurance in the State of Idaho of \$171,492.41, and the amount of taxes shown on that report is \$1,714.92.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 3, for purposes of identification.)

The Court: Do you have any objection to this?

Mr. Horowitz: No objection.

The Court: It may be admitted.

(Whereupon document referred to as Plaintiff's Exhibit 3, was admitted in evidence.)

Mr. Whitla: Now, I offer this in evidence. It is an instrument marked as Plaintiff's Exhibit No. 4. It is a statement of account furnished to us by the defendants in this case, showing premiums collected at the regular rate—

Mr. Horowitz (Interposing): We object to that statement made by counsel of what it shows. We have no objection to the instrument itself.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 4, for identification.)

Mr. Whitla: It shows the statutory earned premiums.

Mr. Horowitz: Whatever it shows is all right, but we object to counsel making a statement as to what it shows.

Mr. Whitla: We offer it in evidence for that purpose—for the purpose of showing the statutory earned premiums.

Mr. Horowitz: I think when it is admitted, if it is admitted by the Court, it is in the record for what it shows.

The Court: Yes; that is true. It may be admitted with that understanding.

(Whereupon Plaintiff's Exhibit No. 4 for identification, was admitted in evidence.)

Mr. Whitla: That is furnished to us as a statement [116] of account. We don't agree to some of the figures, but it is the instrument furnished to us, and we do not agree in some instances with what they have characterized these figures.

Mr. Horowitz: I have for this purpose what can be called a superseding audit.

Mr. Whitla: We will call Mr. Nelson at this time.

OSCAR W. NELSON

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Whitla:

Q. Where do you reside, Mr. Nelson?

A. 721 Empire Avenue, Coeur d'Alene.

Q. How long have you resided in Coeur d'Alene?

A. For forty-two years.

Q. And what is your occupation?

A. Insurance business.

Q. How long have you been engaged in that business? A. Twenty-three years.

Q. Do you know what the regular full commission is on Workmen's Compensation Insurance in the state of Idaho, in this vicinity?

Mr. Horowitz: We object to that as [117] being utterly immaterial.

The Court: I think the objection is well taken, but I will permit him to answer subject to your objection, with the understanding that the Court will make final determination later. In my judgment now, it is not a question of what the rate was, or should be, or anything else, except how much was paid in commissions, as the statute provides that any commission paid outside the state of Idaho, or, rather, that commissions shall be paid to the resident agent for any business written outside the state of Idaho. The statute provides that it shall be unlawful for any foreign insurance company doing business in this state to make, write, place or

(Testimony of Oscar W. Nelson.)

cause to be made, written or placed in this state any policy, bond, duplicate policy, or contract of insurance of any kind or character, or any general or floating policy upon persons or property, resident situated or located in this state, unless done through an agent who is a resident of this state legally commissioned and licensed to transact insurance business herein. A resident agent shall countersign all policies so issued except policies of life insurance, and shall receive the full commission when the premium is paid, except when said policy is made, written or placed by a licensed broker, in which event the counter signing agent shall receive a commission of not less than five per cent [118] of the premium paid. Now, he is entitled to all of the commission unless a broker submits it to him, and then he gets no less than five per cent of the premium paid. I can't see the materiality of this.

Mr. Whitla: I offer this to show what the full commission is.

The Court: I will permit him to answer, but as I say, as yet I don't see the materiality of it.

Q. (By Mr. Whitla, continuing): What is that commission?

A. You mean on compensation insurance?

Q. Yes.

A. Usual practice is the standard rate of commission, ten per cent to the local agent.

Q. And on liability policies, what is the commission?

(Testimony of Oscar W. Nelson.)

Mr. Horowitz: We make the same objection to all of this line of testimony, if that is agreeable?

Mr. Whitla: That is agreeable with us.

The Court: The same ruling.

A. The local agent on general liability, it is from seventeen and a half to twenty-five per cent.

Mr. Whitla: That is all. You may examine.

Cross-Examination

By Mr. Horowitz:

Q. If there is a contract with the producing agent, [119] of course that would govern?

A. I think so.

Q. What you have been testifying to is the commission to the agent who produces the business? A. What the local agent is paid.

Q. The commission to the agent who secures the business?

A. That is the local agent's commission, the rest is governed by law.

Q. Your testimony is as to the commission paid to the agent who secures the business?

A. That is right; yes.

Q. Mr. Nelson, you have been testifying to the flat rate of commission and compensation, on general liability policies. Isn't it a fact that the rate of commission varies with the size of the policy, or risk, that it goes down as the size of the risk goes up?

A.. That is true, to a certain extent, and it varies with the companies.

Q. Yes; that is true, but there is a standard that

(Testimony of Oscar W. Nelson.)

the higher the amount of insurance coverage, the lower the rate of commission?

A. Not in all instances.

Q. But that is true, there is that standard?

A. It could be. [120]

Q. Those things are regulated by contract?

A. I would say that the contract would govern.

Q. Mr. Nelson, isn't it the customary practice for insurance commissions to be regulated by contract? A. Yes, sir.

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

(Witness excused.)

Mr. Whitla: Now, I wonder how I can identify this?

Mr. Horowitz: I think you may identify that as the cashiers file.

Mr. Whitla: Then I would like to have it marked for identification.

Mr. Hawkins: I wonder if for the purpose of identification the Clerk would write on that the words, "Cashiers File?"

Mr. Whitla: That is agreeable with us.

(Whereupon the document was so marked.)

Mr. Whitla: From the cashier's file now I *will* that there be marked the pages I indicate as 5-A, 5-B, 5-C, 5-D, 5-E, 5-F, 5-G, 5-H, 5-I, 5-J, 5-K, 5-L, 5-M, 5-N, 5-O, 5-P, 5-Q, and 5-R?

(Whereupon above documents were marked Plaintiffs Exhibits 5-A to 5-R, inclusive.)

Mr. Whitla: And I will now offer in evidence the pages which have been marked by the Clerk 5-A to 5-R inclusive, Plaintiff's exhibits.

Mr. Horowitz: We have no objection. I would like to call your Honor's attention to the fact that the total of the reports which counsel has offered in evidence is exactly the amount shown by the stipulation.

Mr. Whitla: It does not show the dates of payments.

The Court: If there is no objection the exhibits will be admitted.

(Whereupon Plaintiff's exhibits 5-A to 5-R Inc., for identification were admitted in evidence.)

Mr. Whitla: The plaintiff rests.

Mr. Horowitz: Your Honor, I had not expected the plaintiff to rest quite so soon.

(Further statement by Mr. Horowitz.)

There are certain factual matter which no doubt will be placed in the record in this case, and we hope that your Honor will take out motion, which I shall presently make, under advisement, and I would like at this time to move for a dismissal on the following grounds:

1. That no cause of action for commissions, stated or proved, requiring discovery exists, in that there is no showing that Mr. Eugene H. Ware secured the proposals for [122] the insurance involved.

Second: That there is no proof that any special commission for Eugene H. Ware was fixed for the retrospective insurance involved, or that any premium or commission was paid to anyone for obtaining this insurance so far as this record is concerned;

Third: That the plaintiff is not entitled to commissions based on countersigning services rendered by virtue of Section 40-902, Idaho Code, Annotated, as amended by Chapter 61 of the Idaho Sessions Laws, 1939, in that there is no showing that the defendants did make, write, place, or cause to be placed, made or written in Idaho any policy or bond here involved so as to entitle plaintiff to commissions because the statute does not apply to policies and bonds issued to Walter Butler Company being negotiated and written outside of the State of Idaho, and there is no showing here that it was written inside the state of Idaho. There is no showing that Mr. Ware has not been paid his full commissions on policies secured by him, and no showing of any contract for the payment of commissions on countersigning. The contract, which is exhibit "A," on its face shows that no commission was to be paid for countersigning.

Fourth: That Section 40-902 does not confer a cause of action in favor of the countersigning agent, as distinguished [123] from a statutory penalty, if any there be, for any violation of the law.

Finally, that the statute upon which plaintiff relies, as disclosed by the complaint, particularly Section 40-902, is repugnant to the Fourteenth

Amendment, and unconstitutionally burdens interstate commerce.

The Court: Can you raise that last question here? That is the very matter which the Circuit Court of Appeals of this Circuit passed on.

Mr. Horowitz: I would like to present authorities on that matter.

The Court: I understand it is your request that the Court take this motion under advisement?

Mr. Horowitz: That is right, your Honor.

The Court: Very well. I will take it under advisement.

Mr. Horowitz: There was a request for admission under Rule 36 filed in this Court, and there were answers to those requests. Certain of those requests were answered, others were either not answered, or denied, or set up affirmative matters. I don't know just how your Honor wishes to consider this matter, but for the purpose of determining whether we have an admission, my thought being that in order to get the evidence into the record it would be necessary to have [124] a ruling, and I would call your Honor's attention to Rule No. 36 of the Rules of Civil Procedure, Section "A," which provides: "Any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request, or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request, unless copies have already been furnished. Each

of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such further time as the Court may allow on motion and notice, the parties to whom the request is directed serve upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested, or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.” Now, with that rule in mind, if the Court please, I would like to obtain a ruling as to the effect that certain admissions are made as requested under Rule 36. The requests for admission were filed in July, 1946, and the first question is, for an admission that “each of the following documents exhibited [125] with this request is genuine: checks signed by the Traveler’s Insurance Company in the sum of \$5.00 each on the Chase National Bank of the City of New York, Metropolitan Branch, payable to Eugene H. Ware Company and bearing endorsement of payee dated and numbered as follows,” and then follows a series of numbers and amounts of checks. The answer which is given in what is designated “Reply to requests for admission under Rule 36,” reads as follows: “1. Admits that the checks mentioned and described in paragraph one are genuine, but specifically denies that said checks were written or received in regard to any matter in controversy in this action, or that they have any reference to any matter in controversy in this action whatever.”

Now, I think, your Honor, that the first part of the answer is in direct response to the request. The balance is not. And I would ask your Honor to rule whether Question 1. of our request has been admitted. That is the only portion I would like in evidence in connection with this matter.

The Court: I don't know what counsel has in mind. The question, "That each of the following documents exhibited with this request is genuine," and in the answer is the following, "Admits that the checks mentioned and described in paragraph one are genuine." It seems to me that the balance of the answer is not responsive to the [126] question.

Mr. Horowitz: I would like a ruling of the Court as to whether our request is admitted.

The Court: Yes; it is admitted to that extent, that the checks mentioned and described in paragraph one are genuine. So that you will definitely understand, the Court rules that the balance is surplusage.

Mr. Horowitz: And the second item in the requests is, "2. That each of the following statements is true: 2-A; That Walter Butler Company is and at all times mentioned in the answer was, a corporation organized under and pursuant to the laws of Minnesota. And to that request reads as follows—and I will ask your Honor to rule that the answer to that request, "That plaintiff is informed that Walter Butler Company which built Farragut Naval Training Station in the County of Kootenai, Idaho, was a corporation of the state of Minne-

sota," stands as an admission, and I don't offer that answer insofar as it departs from that admission.

The Court: Yes; that's is correct, no doubt.

Mr. Horowitz: Now, as to our request "M" on page three of our requests, "That Eugene H. Ware did not secure the proposal for insurance coverage contained in policies No. WUB-863386, No. WSLG-863387, No. WSLA-863388, No. HPS-908557, and No. UB-908556. That the proposals for insurance coverage contained in policies No. WUB-863386, No. WSLG-863387, and No. WSLA-863388 were obtained in New York [127] City, New York, through the New York City office of the Travelers." The answer to that request goes into other matters and states as follows: "Answering paragraph 'M' the plaintiff alleges that Eugene H. Ware Company solicited said business, but that he did not secure the proposals which were made in some manner unbeknown to him directly between the parties after he had initiated an attempt to get the business for the defendant." We offer our requests for admission, and ask your Honor to rule that our request has been admitted, but we do not offer that sentence which contains matters not responsive.

Mr. Whitla: I think we have properly answered the requests. I think we are entitled to put the facts in, and not to make merely a bald statement.

The Court: I don't have that request "M"—I will find it here in a moment though—yes; here it is, and I might say that I am inclined to think the Circuit Court of Appeals treated this as a case in which they did not secure the insurance. I believe

that they have admitted the statement as outlined in your request, but they have qualified it to a certain extent. I think possibly the qualification should be allowed to stand.

Mr. Horowitz: I ask leave to withdraw that.

The Court: Yes; you may withdraw it. [128]

Mr. Horowitz: Paragraph "X" of the request on page five reads: "That the original of the letter referred to in sub-paragraph twelve is now in the possession of the plaintiff," copy of which is attached to the answer and permitted to come in over their objection. The answer to the request admits Paragraph "X" subdivision two. I would like to have that in the record.

The Court: It says so. There can be no objection to that.

Mr. Whitla: We stipulate what the letter contains.

(Statement by Mr. Horowitz as to the evidence and the position of the defendants.)

Mr. Horowitz: Now, as to these checks payable to Eugene Ware Company, I think we might dispose of those checks now. I would like this check dated October 22nd, 1936—that is the first check—and the last one is dated May 11th, 1942, there being sixty-eight checks, and these checks are the subject matter here. They are offered in evidence at this time and marked as Defendants' Exhibit No. 6.

(Whereupon documents referred to were marked Defendants' Exhibit 6 for purposes of identification.)

The Court: Is there any objection?

Mr. Whitla: We shall object to that as incompetent, irrelevant and immaterial, if it is attempted to be used for [129] the purpose of showing, or attempting to show, that Mr. Ware received compensation, and under the statute it is void, and it is in contravention of the section of the statute which provides that it shall be unlawful to write any policy, and that any policy written in Idaho will be void unless countersigned by a resident agent.

The Court: Of course, they would be entitled to credit for the amount of checks paid as against any commission due Mr. Ware.

Mr. Horowitz: That was for other services than commissions.

The Court: I will admit the exhibit.

(Whereupon Defendant's Exhibit No. 6 marked for identification, was admitted in evidence.)

Mr. Horowitz: I wish to offer Exhibit No. 7 now, being a letter dated October 21, 1936, addressed to Eugene H. Ware Company, 104 Fourth Street, Coeur d'Alene, Idaho, and it is referred to in the stipulation.

(Whereupon document referred to was marked Defendant's Exhibit 7 for purposes of identification.)

Mr. Whitla: As to that we object as being absolutely in contravention of the laws of the state of Idaho, if it is intended to be introduced by the defendants. It is a void transaction, void under the

laws of Idaho, and against [130] the public policy of Idaho. Section 40-902 of the Idaho Code, as amended by the 1939 Session Laws, at page 109, and Section 40-1201 prohibit the writing of any policy that does not conform to the laws of the state of Idaho, and provides that any regulations or any writing or stipulation of the policy which is void, then the statutes of Idaho shall be read into the policy and considered to govern. I think the rule is well established that where the statute of the state lays down a public policy it must be followed, and any attempt or agreement in controvension of that statute is void, and I have authorities to offer on that.

The Court: I am inclined to think, although I have not read that letter—I think the general statement made by counsel perhaps is correct. However, I will reserve my ruling on this matter, and we will proceed at this time, and for the present it may be admitted.

(Whereupon Defendant's Exhibit 7, for identification, was admitted in evidence.)

Mr. Horowitz: Now, in reference to the exhibits that have been offered, counsel has a number of pages which he has offered in one of the exhibits—I believe it was the first exhibit. I desire to offer the entire exhibit. I wonder how your Honor wishes to have that done? Shall I have the balance of the pages numbered, or would it be sufficient if I offer the [131] balance of this exhibit?

The Court: I think that would be sufficient. The

Clerk can designate the balance of the exhibit, and give it a number.

(Whereupon document referred to was marked Defendants' Exhibit 8, for purposes of identification.)

Mr. Horowitz: At this time I offer in evidence copies of the balance of the endorsements, which appear in Plaintiff's Exhibit No. 1, my offer being the balance of the documents referred to in that exhibit. My offer would refer to, and is, the balance of the documents other than those identified as Plaintiff's Exhibits No. 1, 1-A, 1-B, 1-C and 1-D.

The Court: What number will be given that, Mr. Clerk?

The Clerk: Defendant's Exhibit No. 8.

Mr. Whitla: We object to these. A large number of the exhibits, or documents, bear date long after the policy in question was cancelled. We object to it as incompetent, irrelevant and immaterial. The provision in this Exhibit 1-B is that the policy was cancelled by the action of the parties in accordance with the terms of the contract on July 30th, 1943, and a lot of these exhibits are dated after that time. [132]

The Court: How is the Court going to segregate all this without having each item pointed out, that is, each of the items that you objected to.

Mr. Whitla: My objection goes to all of the exhibit following our exhibit 1-D.

The Court: If we can admit this at this time, and then you can point out in your argument and

brief the parts that you consider objectionable, as being immaterial.

Mr. Whitla: That will be agreeable.

The Court: Then it is admitted, without objection, except the parts considered immaterial, and they will be pointed out in the arguments and briefs of counsel.

(Whereupon Defendants' Exhibit 8 for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer in evidence Defendants' Exhibit No. 9, which is an audit that was furnished here in connection with motion for inspection of documents.

(Whereupon document referred to was marked Defendants' Exhibit No. 9, for purposes of identification.)

Mr. Whitla: Your Honor, I object to this. Counsel stated that this is superseded by a complete audit, which was our exhibit No. 4. This is a part of the time for exactly the same work, except that Exhibit No. 4 is a complete audit, bringing down to the time the work was finished, and this would only [133] tend to confuse the matter.

The Court: There are no other objections, except that it contains some of the matters?

Mr. Horowitz: These are the documents, or copies of the documents we furnished you, and we want to introduce these things all in evidence.

The Court: It may be admitted, subject to your objection, Mr. Whitla.

(Whereupon Defendants' Exhibit No. 9 for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer exhibit No. 10, which is a preliminary computation of earned premiums which was furnished to counsel.

(Whereupon document referred to was marked Defendants' Exhibit No. 10 for purposes of identification.)

Mr. Whitla: I object to it as incompetent, irrelevant and immaterial. The fact that the same thing has been furnished to me does not make it admissible. It must be admissible for some other reason than that. The simple fact that I asked for some of these things in my requests for documents to inspect them, does not mean that the defendants can put everything in evidence. We stipulated as to the amounts shown on these, and how they have been computed. Now, I cannot see why we should encumber the record with a hundred or so [134] pages of a document of this kind. I *think* it will have any tendency to enlighten the Court.

The Court: Mr. Whitla, you simply argue the reasons it should not be admitted. Will you just state the grounds of your objection?

Mr. Whitla: Yes, your Honor. On the ground that it is incompetent, irrelevant and immaterial, and encumbering the record, and that we have stipulated to the facts that are shown in the exhibit.

The Court: You don't object to the way in which it is prepared?

Mr. Whitla: I don't know how it was prepared.

The Court: The possibilities are that the objection stated in the record is not well taken, and I take it, Mr. Horowitz, you have the witness here who prepared this exhibit?

Mr. Horowitz: We have a witness to explain all of these exhibits.

The Court: With the understanding that it will be connected up, I will admit it.

(Whereupon Defendants' Exhibit No. 10 marked for identification, was admitted in evidence.)

Mr. Horowitz: At this time I offer in evidence Defendants' Exhibit No. 11, which is a computation prepared subsequent to the preliminary computation. [135]

Mr. Whitla: We object to this. It is something that was prepared entirely after this action was commenced. The title page is dated October 23rd, 1945. It is wholly incompetent, irrelevant and immaterial, in view of the fact that we have stipulated what the figures are.

The Court: It may be admitted, subject to being connected up.

(Whereupon Plaintiff's Exhibit 11 for identification was admitted in evidence.)

Mr. Horowitz: Mr. Clerk, do you have page No. 24 of the photostats among the things Mr. Whitla handed to you?

(Whereupon, the Clerk produced all exhibits.)

Mr. Horowitz: At this time we offer Defendants' Exhibit No. 12, and also the same type of Exhibit which is marked Defendants' Exhibit 13. These are two letters referred to in the stipulation, and the offer is explanatory to the stipulation.

(Whereupon Defendants' Exhibits 12 and 13, being the documents referred to, were marked.)

Mr. Whitla: We make this objection: That is incompetent, irrelevant and immaterial. They simply write a letter to the effect that they claim some tax refund, and ask what to do about it. Nothing was done, and of course the time for approving it, or for taking any proceedings to recover [136] is now past.

Mr. Horowitz: Counsel has included reference to these letters. Now, in order to show what the letters are I offer them, simply as explanatory of the stipulation.

The Court: They may be admitted for that purpose.

(Being letter dated February 28, 1944, addressed to the Director of Insurance, Boise, Idaho, signed "C. P. Osgood, Secretary.")

(Whereupon Defendants' Exhibits 12 and 13, for identification, were admitted in evidence.)

Mr. Horowitz: That included Exhibit No. 13?

The Court: Yes; it was admitted also.

(Exhibit No. 13 being letter dated February 8th, 1944, addressed to the Industrial Accident

Board, State of Idaho, Boise, Idaho, and signed, "C. P. Osgood, Secretary.")

Mr. Horowitz: I now offer Defendants' Exhibit No. 14, No. 15, and No. 16, being three photostatic copies, or, rather, photostatic copies of three pages of a letter dated February 2nd, 1943, being the letter referred to in Exhibit No. 12, where it says, "For more complete details in regard to this subject, please refer to attached copy of my letter written under date of February 2nd, 1943, to the Idaho Industrial Accident Board." Exhibit No. 12 [137] does not have that copy attached, and I am furnishing it in this exhibit. These three sheets, a part of a photostatic exhibit, bear sheet numbers 49, 50 and 51, and bear the Clerk's number now of 14, 15 and 16.

(Whereupon documents referred to were marked Defendants' Exhibits 14, 15 and 16, for identification.)

Mr. Whitla: We object to this as being only one side of the correspondence. I think you should have both sides of the correspondence.

Mr. Horowitz: I would be perfectly willing to put it all in.

The Court: Then you may go ahead and place it all in evidence, to satisfy the objection, and it may be admitted with the understanding that if there is any other correspondence or any other letters, you may introduce them. I think, too, that the letter which this letter was answering should be admitted, along with the letter you have intro-

duced in evidence. At this time we will recess until two o'clock.

April 30th, 1947. 2:00 P.M.

Mr. Horowitz: If the Court please, I want to be certain about the ruling made as to the exhibits that were last introduced before the noon recess.

The Court: The Court ruled that if the other letter was placed in evidence, then they would also be admitted. It may be possible that the Court can determine something from these exhibits, but it seems to me now that there is one question, and only one question, and these exhibits are all more or less confusing, but we will proceed. However, it seems to the Court that the statutes provide that the agent is entitled to the full commission when the premium is paid. The question is as to what commission was paid. At the present time I don't see where the other part of the statute has any bearing on this, but possibly it may have, and I want you to understand that the Court is not pre-judging this matter now. I gathered from counsel for the plaintiff that it is their contention that the statute cannot be waived by a contract or an agreement. If that is true, then there is only one question, and that is the question of commission, what commission was paid outside the state of Idaho, if any. Whatever amount is, under that theory that the statute is mandatory, and the Court has already said,—that is, the Court of Appeals had said that the statute is constitutional. If this is all true, then that amount would be due to the plaintiff here under

their theory. At the present time I don't see where any of these exhibits are going to be very helpful to the Court, but I want to give you all the opportunity possible [139] to present your various theories of this case.

Mr. Horowitz: I thoroughly appreciate the Court's position because of the stipulation which is rather confusing, and because of certain exhibits offered in evidence and I don't want to do anything to make a case of confusion worse confounded.

The Court: It certainly is getting to that state very fast.

Mr. Horowitz: Mr. Whitla, I wonder if you will indicate to me just what you wish me to introduce?

Mr. Whitla: I have the other letter here.

Mr. Horowitz: May I say to your Honor that this letter that I offered as Defendants' Exhibit 14, 15 and 16 refers to the letter dated August 10th, 1942, and I will say to Mr. Whitla that I certainly have no objection to that letter going in.

Mr. Whitla: Perhaps I had better wait until rebuttal to introduce this.

The Court: It may be admitted with that understanding, that it refers to one letter only.

(Whereupon Defendants' Exhibits 14, 15 and 16, for identification, were admitted in evidence.)

Mr. Horowitz: I now offer in evidence Defendants' Exhibit No. 17, which is a letter dated August 30, 1943. It [140] is taken from the cashier's file, or rather, is a part of the cashier's file introduced here.

(Whereupon document referred to was marked Defendants' Exhibit 17 for purposes of identification.)

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial. It is a letter concerning a rebate which is prohibited by statute.

The Court: Isn't that covered by your stipulation,—I will admit the exhibit at this time, and it will perhaps save time.

(Whereupon Defendants' Exhibit 17 was admitted in evidence, being letter dated August 30th, 1943, addressed to the Acme Brokerage Corp. 20 Pine St., New York, and signed by A. W. Terhune, Branch Accountant.)

Mr. Horowitz: At this time we will call Mr. Peterson as our first witness.

GEORGE E. PETERSON

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Horowitz:

Q. Will you tell the Court where you reside?

A. I reside at 27 Van Buren Avenue, West Hartford, Connecticut.

Q. And your age? [141] A. Sixty-seven.

Q. Your occupation?

A. I am secretary of the Compensation and Liability Department of the Travelers Insurance Companies of Hartford, Connecticut.

(Testimony of George E. Peterson.)

Q. As secretary of those departments what is generally your duties?

A. My duties consist of setting up rules and regulations in regard to acceptance or rejection of the casualty lines that are offered to us, supervising the assistant secretaries, the underwriters, and the activities of the underwriters and their assistants.

Q. So that we can get some idea of the coverage which you supervise, will you tell the Court how much of the insurance risks that are written by the Travelers lines come under your supervision?

A. Well, in this particular period, 1942, I imagine we had some seventy million dollars premiums. I remember the record distinctly applying to 1946. There were paid premiums exceeding one hundred million dollars for that year.

Q. How many insurance policies would that premium income represent?

A. Well, something less than one million policies.

Q. What area is covered by those risks? [142]

A. Every state of the nation and Washington, D. C., Canada, Alaska, and there is some operation outside of the country.

Q. With reference to the character of the rating used, as you have stated, as between the prospective and the retrospective ratings, they come under your supervision?

Mr. Whitla: We object to this as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of George E. Peterson.)

A. I had supervision of the retrospective and the prospective ratings.

Q. Will you define the prospective ratings?

A. The prospective risks are where the premium rate is determined in advance. The company takes on a risk by getting a listing of the risk, and no adjustment on the policy is made by reason of good or adverse experience, and in that connection with the retrospective rating it is different. You establish the factor whereby the risk enjoys the benefit of the experience that comes, or occurs, during the pendency of the policy, and of course it adversely affects them if the experience is adverse.

Q. In the event that the loss experience is favorable in view of the premium paid what happens in that case?

A. There is a plan worked out under the policy indicating [143] as to what audit calculations shall be made. If it develops that there is a premium payment in excess of that, then the premium is returned to the policy holder. If the experience is adverse and there is a premium due the company it is paid by the assured.

Q. Is the retrospective rating a common type of rating? A. Yes, sir.

Q. Is it rather universally used?

A. Yes, it is used by a majority of the states, and has been for more than ten years. It is accepted in more and more states.

Q. I call your attention to the "Comprehensive

(Testimony of George E. Peterson.)

Plan," sometimes known as the War Projects Rating Plan, are you familiar with that?

A. Yes, sir.

Q. Do you have supervision of risks written under that plan?

A. I do with the Travelers companies.

Q. Is the War Projects Rating Plan, or Comprehensive Plan, a prospective or retrospective plan of insurance?

Mr. Whitla: We object to this. It is entirely immaterial. We have the plan in evidence.

The Court: He may answer.

A. It is definitely retrospective. [144]

Q. How much coverage did you supervise during the years when that plan was in use?

A. The total standard premium of War Projects Rating Plan business represents some ninety-seven million dollars in the Travelers Companies during that period.

Q. What area was covered by that type?

A. It covered some thirty-four states, the District of Columbia, Alaska,—that was on the Alcan Highway,—the islands of the Caribbean, Newfoundland, and some in Iran and Irak; some in Central America, and I think one in South America.

Q. In connection with what type of contract, was that plan used?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial.

The Court: I think it is, but he may go ahead.

A. It had application to the fixed fee, and cost

(Testimony of George E. Peterson.)

plus contracts entered by the Government during the period of the war, for the building of factories of various kinds, of munition plants, navy yards and other facilities.

Q. What was the occasion for the use of that plan?

A. It goes back to the start of the war. Prior to the adoption of this Projects Rating Plan,—

Mr. Whitla (Interposing): That is entirely immaterial. [145]

The Court: I think it probably has nothing to do with it, but he may go ahead.

A. Prior to the time this plan was adopted, various Government agencies that had power to let contracts with individuals who were interested in insurance for the workmen, or public liability insurance, were compelled by an edict in Washington, or by an act of Congress—

Mr. Whitla (Interposing): I object to this. It is purely a conclusion of this witness as to what Congress—

The Court: The Court will not consider what this witness says the law is. He may state what he knows.

A. They had to get four bids from four different carriers without distinction as to the qualifications of those carriers, and it was necessary to assign it to the lowest bidder, and it was apparent that in order to make available all of the insurance facilities to the United States—this was recognized by the War Department, first—

(Testimony of George E. Peterson.)

Mr. Whitla (Interposing): I object to this as incompetent, irrelevant and immaterial. It seems to me that this is not evidence at all. It is not a subject that we could offer any evidence on to disprove—

The Court: That is correct. He can testify as to the facts, just what he knows.

Q. (Mr. Horowitz, continuing): In view of the experience [146] that you had in the use of this plan, what was the function that the plain performed in connection with fixed fee contracts?

A. Its function was to procure to the Government insurance at the lowest possible cost, and also to make available all the facilities of the insurance industry during the war.

Q. Prior to the adoption of that plan, was it possible for the Government to take advantage of all of the insurance facilities that were available?

A. No; it was not.

Q. What could it take advantage of?

A. It was on the lowest bid basis, and it would all go to the non-stock companies.

Q. Why?

A. Because of the method of calculating the acquisition cost.

Q. You mean that mutual companies didn't pay any commission? A. Yes, sir.

Q. What effect did that have as to the stock companies?

A. Well, this plan put them on a parity and made them all available for this work.

(Testimony of George E. Peterson.)

Q. What was eliminated to make that possible?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial.

The Court: He may answer. [147]

A. The matter of paying commissions in connection with the premium, which was developed under the plan.

Q. In 1941 did the Navy publish a plan under which it would reimburse cost plus a fixed fee contractors in connection with the writing of insurance?

A. It did.

Q. After the promulgation of the plan did you have anything to do with the writing of insurance under that plan?

A. Yes, sir. In addition to my duty, I was also appointed on a committee which was charged to administer this plan and work out rules and regulations.

Q. Did you have occasion to consult with Government officials on this matter?

A. Yes. We couldn't even hold a meeting without various agencies and departments, or representatives of departments being present, and participating in the meetings.

Q. I hand you what has been marked as Defendants' Exhibit 18 for identification, and I call your attention to the sub-exhibits contained in that, known as exhibits "C" and "D," and I will ask you to state if that is the plan to which you testified was published?

(Testimony of George E. Peterson.)

(Whereupon, document referred to was marked Defendants' Exhibit 18 for purposes of identification.)

A. That is the plan; yes, sir. [148]

Q. Now, directing your attention to the three policies in suit here, will you please advise where the proposal originated for the first three policies—they are number WUB-863386, number WSLG-863387 and number WSLA-863388?

A. Those are the numbers of the policies under the War Projects Rating Plan?

Q. Yes.

A. They are requests that first came to our 55 Johns Street Office at New York from a concern by the name of the Acme Brokerage Corporation. The inquiry was directed to the assistant manager, George McGrath. The inquiry was as to whether or not the Travelers Company would be interested in that coverage.

Q. And—

Mr. Whitla: If it was in writing that, of course, would be the best evidence.

Q. (Mr. Horowitz, continuing): Was that oral or in writing? A. Originally it was oral.

Q. Was it your duty to determine the status of those named in inquiries relative to insurance risks?

A. Yes, sir.

Q. Did you acquire knowledge concerning the inquire as to whether the Travelers Companies would issue this insurance? [149] A. Yes, sir.

(Testimony of George E. Peterson.)

Q. What was the knowledge that you acquired?

Mr. Whitla: Now, we object to this as hearsay of the worst kind. It is what someone else told someone else, and they told him. That would not be proper evidence.

The Court: Of course, I cannot tell yet what his answer would be. Do you wish to cross-examine him as to your objection, Mr. Whitla?

Mr. Whitla: Yes; I do.

Examination

By Mr. Whitla:

Q. You got all of that information from somebody else? A. Yes, sir.

Q. Someone else told you what someone had told them? A. Yes, sir.

Mr. Whitla: Now, we object to that as hearsay.

The Court: Sustained.

Direct Examination

(Resumed)

Q. (Mr. Horowitz, continuing): Was it any part of your duties at that time to pass upon insurance risk proposals?

A. Because of the newness of the Projects Rating Plan the secretary in charge of the department and I decided that I would personally, or that my assistant would personally, review every case of that character. That is the reason that [150] this case to me. I was in Washington at the time and they contacted me by telephone at Washington, and I contacted the Navy Department—

(Testimony of George E. Peterson.)

Q. (Interposing): What was the occasion of your contacting the officials in Washington in relation to this application?

A. There were certain details that I must have knowledge of: One was this cost plus contract. I wanted to know the size of the risk, and whether it was written on full medical or on ex-medical—

Q. (Interposing): From whom did you learn of the proposal? A. My assistant.

Q. Who was he? A. L. A. Kline.

Q. After you learned of the proposal—at that time he was where, Mr. Peterson?

A. He was at Hartford, Connecticut.

Q. Did you approve the risk?

A. I approved it for insurance.

Q. What authority did you give anyone as to the acceptance of the risk?

A. I advised the person in New York with whom contact was made by the Acme Brokerage Company that he could proceed with the issuance of the binder coverage.

Q. Was a binder issued? [151] A. It was.

Q. Where? At New York City.

Q. I hand you Exhibit No. 19 marked for identification and I will ask you if that is the binder.

(Whereupon, document referred to was marked Defendants' Exhibit 19 for purposes of identification.)

A. That is the binder.

Q. (Mr. Horowitz, continuing): To which you referred? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Is it an original copy?

A. No; it is a carbon copy of the original, having been made at the same time. The original was on top of this copy.

Q. To whom was the original delivered?

A. To the Acme Brokerage corporation.

Q. Is this a copy of the one delivered to them?

A. It is a duplicate.

Q. Whose original signature appears on that?

A. George McGrath's.

Q. Who is he?

A. The assistant manager of the 55 John Street office.

Q. Was this the binder that you authorized him to sign? A. It is.

Mr. Horowitz: I offer this binder in evidence.

The Court: Is there any objection?

Mr. Whitla: It is objected to as incompetent, irrelevant and immaterial. It appears that this was followed by a policy, and the policy is the real contract.

The Court: It will be admitted.

(Whereupon, Defendants' Exhibit No. 19 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): What is the function of this binder?

A. The binder is a contract of insurance in accordance with the policies described in the binder, and is contemplated to be replaced by the policies.

Q. When was that binder issued?

(Testimony of George E. Peterson.)

A. On or about April 28th, 1942.

Q. Does that binder indicate that it was written under the War Projects Rating Plan?

A. Yes, sir; it says so specifically.

Q. You mentioned the Acme Brokerage Company? A. Yes.

Q. What function did it have in this transaction?

A. They indicated that they were qualified as advisers.

Mr. Whitla: He testified that this had come to him from someone else.

Q. (Mr. Horowitz, continuing): Do you know whether the [153] Acme Brokerage Company was the adviser of the Walter Butler Company?

A. I know they were.

Q. In connection with the issuance of this binder and the writing of this contract, was any commission paid to anyone? A. No.

Q. Following the issuance of this binder, were policies made up? A. Yes, sir.

Q. Where? A. At Hartford, Connecticut.

Q. The policies that were made up were physically written at Hartford, too? A. Yes, sir.

Q. What happened to these policies?

A. After the policies were written they were sent to Mr. Ware in this town for countersignature.

Q. What happened after that?

A. There was—

Q. (Interposing): Where did they go?

A. They were sent to our New York office.

Q. In connection with the transmittal of these

(Testimony of George E. Peterson.)

policies do you have in your possession Mr. Ware's letter of transmittal? [154]

A. Yes, sir.

Q. Please get it for me. Now, I hand you exhibit which has been marked Defendants' Exhibit No. 20, and I will ask you to state if that is the letter sent by Mr. Ware to the Travelers New York office?

(Whereupon document referred to was marked Defendants' Exhibit No. 20 for purposes of identification.)

A. That is the one I had reference to.

Mr. Horowitz: I offer it in evidence at this time, if the Court please.

Mr. Whitla: We have no objection to this.

The Court: It may be admitted.

(Whereupon, Defendants Exhibit No. 20 for identification was admitted, being letter dated May 25, 1942, addressed to the Travelers Insurance Company, 55 John Street, N. Y., and is signed Eugene H. Ware Co., by E. Thomas.)

Q. (Mr. Horowitz, continuing): I now direct you to look at Exhibit marked No. 21, Defendants' Exhibit No. 21, and state what it is.

(Whereupon, document referred to was marked Defendants' Exhibit 21, for purposes of identification.)

A. That is information regarding the exchange of wires.

Q. By whom is it written?

A. Eugene H. Ware Company. [155]

(Testimony of George E. Peterson.)

Q. To whom is it addressed?

A. The Travelers, Hartford, Connecticut.

Q. Does it have reference to these policies?

A. Yes, sir; it says so.

Mr. Horowitz: I offer this in evidence.

Mr. Whitla: No objection at all.

The Court: It may be admitted.

(Whereupon, Plaintiffs' Exhibit 21 was admitted in evidence, being letter dated May 29, 1942, addressed to the Travelers, 9 Central Row, Hartford, Connecticut, attention Mr. H. W. Swartfiguer. It is signed by Eugene H. Ware Co., by E. Thomas.)

Q. (Mr. Horowitz, continuing): After the delivery of the policies to the Acme Brokerage Corporation at New York did the Travelers pay that company anything for any services? A. No.

Q. There has been introduced in evidence Plaintiff's Exhibit No. 1, 1-A, 1-B, 1-C and 1-D, and all of the remaining number of this exhibit collectively described as Defendants' Exhibit 8. I would like you to explain each of the instruments in that exhibit starting with the very first, state generally if those purport to be a copy of the instruments in connection with this policy? A. Yes, they are.

Q. Now, then, the balance of the endorsements—Plaintiff's Exhibit No. 1, just state what that is.

A. Travelers compensation insurance policy covering this risk.

(Testimony of George E. Peterson.)

Q. That is policy No. WUB-863386, that is the compensation policy? A. Yes, sir.

Q. And the next document, marked 1-A, that is what?

A. That is the Idaho statutory endorsement?

Q. And 1-B?

A. That is the provision for loss and expense. It is entitled "Loss and Expense Constants Endorsement," and there is also the notice of cancellation. There are two exhibits on this page marked 1-B.

Q. And 1-C, what is that?

A. That is the endorsement for the Workmen's Compensation and Employer's Liability policy.

Q. And 1-D, what is that?

A. That is also a general endorsement for workmen's compensation and Employer's liability policy.

Q. Was that a part of the policy issued in this case? A. Yes, sir; it was.

Mr. Whitla: I just want to call counsel's attention to the fact that this is different, apparently, from the [157] copy I have here.

(Whereupon, remarks were passed back and forth between counsel regarding the exhibit.)

Mr. Horowitz: It so happens we have another copy here, and we can check this, and I would suggest we substitute our copy for the copy the clerk has now, and they will contain everything that has —that our copy has.

Mr. Whitla: That is agreeable.

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Now, I call your attention to the policies referred to in that endorsement, in line one? A. Yes.

Q. Now, then, Mr. Peterson, where else in this exhibit marked Exhibit 8 are the endorsements concerning the War Projects Rating Plan on the remaining two policies?

A. They are in a corresponding position in the back of the exhibit in connection with policies WSLG-863387 and similarly we have the War Projects Rating Endorsement for the automobile liability policy No. WSLA-863388.

Q. I call your attention to each of these two endorsements that you testified to last, to the reference under the heading of "Premium Adjustment," on page two of the general endorsements for the general liability policy. With reference to Policy No. WSLG-863387, I will ask you if that refers to War Projects Rating on the compensation policy?

A. Yes, sir; it does; in fact, it reads, "The premium for this policy is to be computed in accordance with the provisions of the War Projects Insurance Rating Plan Endorsement forming a part of policy No. WUB-863386."

Q. Now, look at the next endorsement in there and tell the Court if the same thing occurs there.

A. Yes, sir; it does. It ties to this compensation policy and gives the same number, WUB-863386.

Q. Does the issue date of the policy appear on each of the three policies?

(Testimony of George E. Peterson.)

A. The issue date of the policy itself?

Q. Does the issue date appear on the compensation policy? A. Yes, sir.

Q. And what is the date?

A. May 18th, 1942.

Q. And what is the issue date of the other, the second policy? A. May 18th, 1942.

Q. And on the third policy?

A. Yes; May 18th, 1942, also.

Q. Now, Mr. Peterson, just in summary, each of the three policies were issued on the same date and carry the same endorsements in regard to the War Projects Rating [159] Endorsement?

A. Yes, sir.

Q. I call your attention to the fact that that endorsement seems to be dated a later date than the policy?

A. There could be many reasons for it. You start out on a policy and there is always the intent—that was true with all these War Projects ratings. We were trying to work out a plan that would be uniform, and there were corrections to be made, and they followed the policies out. There is an error found and we change it and make it effective with the beginning of the policy.

Q. In other words, if there are changes to be made the endorsements are made at a later date than the initial issuance of the policy, but it dates back to the issue date of the policy?

A. Yes, sir; or it may be some other date.

Q. Whatever the date is, it is shown on the

(Testimony of George E. Peterson.)

endorsement? A. That is right.

Q. I call your attention to endorsement numbered 1721 which the clerk has marked for identification as "A," being endorsement No. 1721. Will you look at that and see if you can tell us what that has reference to?

A. Yes, sir. That has to do with allowing you to make assignments of the premium.

Q. Can you refer in that document to the instrument [160] which is in quotation marks, reading, "Agreement regarding premium payments under War Projects Insurance Rating Plan Endorsement"? A. Yes, sir.

Q. Will you turn to that?

A. Here it is, right here (indicating).

Q. Now, will you look at the page marked "ID No. B," is that the instrument to which the endorsement that you testified a moment ago, which is identified as identification "A," refers?

A. Yes, sir.

Q. Tell us whether endorsement marked for identification "A" refers back to the Comprehensive Rating Plan, or this later instrument?

A. You mean the one that was on the policy?

Q. Does it refer only to this later endorsement marked "B"? A. No, to the policy, too.

Q. This War Rating Plan was on the policy in the beginning? A. Yes, sir.

Q. This is a later endorsement. Now, will you please tell the Court what agreement is referred to in endorsement marked "A"?

(Testimony of George E. Peterson.)

A. This in here amends the policy so that it makes this [161] applicable to the entire policy premium any time you want to do it.

Q. You mean what?

A. I mean that "A" ties "B" into the policy.

Q. And what is "B"?

A. That is the assignment of the premium obligation.

Q. To whom?

A. To the United States Navy.

Q. And by whom?

A. The Travelers Insurance Company and Walter Butler Company.

Q. Tell the Court whether similar types of endorsements existed with respect to the other two policies?

A. Yes, sir; they should be on the other two policies. Here is the same endorsement as is labeled "A" under policy WSLG-863387, and we have a duplicate of exhibit "B" on that same policy, WSLG-863387, and we find similar endorsements on policy USLA-863388.

Q. And that takes care of the two policies?

A. Yes, sir.

Q. Turning now, Mr. Peterson, to the War Projects Rating Plan Endorsement which is in this exhibit, Defendants' Exhibit No. 8, on the side, and carries the number of 3016, I want to call your attention to the method provided in that [162] endorsement for computing the premium used when that endorsement is a part of the policy. Please

(Testimony of George E. Peterson.)

explain how the premium is computed under that endorsement.

A. I will take these up in sequence. First, it tells how the premium—the standard premium is computed, and defining the standard premium. It is made up by a manual of rates applicable to the classifications that are used to describe the operation of the insured, and the next item I want to define this: You have losses incurred. That means the sum of all the losses, both paid and outstanding. That is the losses which are actually incurred, and the modified losses, that means those losses described increased to take care of claim adjustment cost. Under this plan the Government has set up a factor of 1.12, so you multiply the actual losses by 1.12 to get the modified losses; allocated claims expenses are such items as have to do with such things as expert testimony in connection with occupational diseases or medical examinations, or X-rays or anything like that. Fixed charges relate to the provision of the plan that has to do with the actual expenses of the home office pay roll, inspections, and incidental expenses other than expenses which have been allowed in connection with adjustment of claims, and exclusive of expenses for commissions, providing for no profit whatever. It is the true cost. Having [163] established these factors you determine the size of the risk on the best estimate possible, and that becomes the standard premium. However, the maximum premium is ninety per cent of the standard premium. You take the fixed charge

(Testimony of George E. Peterson.)

percentage as set up in the table shown and multiplying by the fixed percentage you get the fixed charge. To that fixed charge you add the modified loss. That is arrived at by this factor of 1.12 which I described, and you may add the allocated claimed expenses, and that becomes the premium which is subject to the tax applied in the locality, and the sum of all these various things, that becomes the final premium under the plan, subject, however, always to the maximum of ninety per cent of the standard premium.

Q. The final premium, Mr. Peterson, how is that characterized?

A. The final earned premium.

Q. Is there a provision for any interim payments on account of the premium?

A. Yes, it provides for a deposit, or a temporary payment, or a premium advance.

Q. What is the first?

A. The first is fifteen per cent of the estimated standard premium. That is something you have to account for, and then it provides for periodical audits, and they also call for interim [164] payments and premiums which are predicated on the developed premium as a result of the advances. The carrier is not permitted at any time to charge the full premium, since the plan provides for fifty per cent of the earned standard premium on policies written on a pay roll basis determined by the periodical audits, and fifty per cent of the earned standard premium on all other policies determined on a

(Testimony of George E. Peterson.)

basis of what they call actual monthly exposures.

Q. The payment of fifty per cent, now what is the next calculation after you get this?

A. There is a provision also, under this rating, for the furnishing of an itemized statement of incurred losses. At a certain period the plan calls for an adjustment. Sixty days after the termination of the policy there is demanded by the plan an adjustment which is called a preliminary adjustment. In that adjustment you make the calculation of the premium as I have described here. If the premium developed by the experience is less than the premium that you have collected by this method and as shown by the audit, that is, if the premium due is less than the amount collected, there is then due to the assured—unless the Government had already taken over by assignment, a return of premiums which have been collected. In case it is indicated by the experience, conversely, [165] that is, that the premium collected is less, it may call for additional premium from the risk to bring it in conformance with the plan as I have described it. However, all of this must come within the ninety per cent maximum of the standard premium.

Q. What is that called?

A. That is the final premium computation, and, by the way, it cannot be made more than six months after the termination of the policy.

Q. In particular reference to this policy, Mr. Peterson, were the steps in the plan which you have testified to used in computing the earned premium?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. I hand you now what has been marked as Defendants' Exhibit No. 9, and I will ask you to state what it is in connection with this plan.

A. This is an audit voucher.

Q. At what stage of the proceedings?

A. It represents one of the audit periods and has reference to the pay roll for the period of April 10th, 1942, until July 30th, 1943.

Q. What is the net result, generally, of the audit?

A. It determines the standard premium, which, in turn, determines the maximum premium, and also the—also determines the fixed charge. [166]

Q. Is it used as the basis for the payment of the fifty per cent you spoke of? A. Yes, sir.

Q. Turn to the last page and show us where it appears. A. May I make an explanation?

Q. Yes.

A. I think I said from April, 1942, to July, 1943. The first page shows April, 1942—April 10, 1942, to July 25th, 1942.

Q. Now, Mr. Peterson, turn to the last page on that exhibit and show us where the fifty per cent payment on the premium appears.

A. Take this page dated December 2, 1942, for the period of August 29th, 1942, until October 31st, 1942, in this case you have a total earned premium of \$1062.96, and fifty per cent of the standard earned premium, \$531.48.

Q. That is the amount paid to the carrier?

A. That is right.

(Testimony of George E. Peterson.)

Q. Will you look at Defendants' Exhibit No. 10 and state what that is in relation to the method?

A. That is the preliminary adjustment that takes place about sixty days after the termination of the coverage.

Q. Did it develop the returned premium? [167]

A. This risk had a remarkably good experience. It returned a substantial amount.

Q. What was the amount?

A. \$440,985.33 on all coverage.

Q. On the three of these policies?

A. Yes, sir; they were combined.

Q. I call your attention now to Exhibit No. 11, what does that represent?

A. That is the net final cost. It has not been passed through the company records. It is on the form that it was a tentative calculation of the final premium on this risk.

Q. According to the calculations made, what was the additional refund due to the Government?

A. There is an additional refund at the time this was made of \$7,730.83.

Q. I hand you stipulation and show you where the earned three premiums appear—

A. (Interposing): Well, in this figure there is included—

Q. Just tell me what it is.

A. \$246,126.56, and as it applies to the State of Idaho, as I said, there was some in here to the State of Washington. The State of Idaho figured \$246,124.35.

(Testimony of George E. Peterson.)

Q. Now, Mr. Peterson, this is Defendants' Exhibit No. 11, or the final computation. It shows \$246,126.56, whereas this [168] indicates also \$246,-126.56. That is exactly the same? A. Yes.

Q. You have referred to Defendants' Exhibit No. 9, which reads, "Corrected"? A. Yes, sir.

Q. I call your attention to Exhibit No. 4—Plaintiffs' Exhibit No. 4, which reads, "Superseding," is that the audit on which fifty per cent of the standard premium was also calculated? A. Yes, sir.

Q. Was that submitted in connection with the determination of the premium?

A. Yes, sir; there are audits made for various periods. I am speaking now of the compensation policy from April 10th to July 25th, and the policy numbered WSLA-863388, and WSLG-863387. The next period takes from July 25th to August 29th, and you go through the three policies again, and then you pick up the period of August 29th to October 31st, and go through the three policies again.

Q. What is the reason for having a superseding audit?

A. Well, what happened here, he was there to make an audit up to January 2nd, according to the files I have read, and the advice we had, for the reasons there were a number of errors in the pay roll, and possibly some errors in the rates. [169] There was an opportunity to make a clean sweep, a sort of review of it to cover the period from November 26th to January 2nd, and then this be-

(Testimony of George E. Peterson.)

comes the final record of the earned premium during that period.

Q. You mean exhibit No. 4? A. Yes, sir.

Q. Now, Mr. Peterson, does the plan in this case, as applied to these three policies make a provision for an adviser, an insurance adviser, by the assured?

A. Yes, sir; it does.

Q. The plan would show that? A. Yes, sir.

Mr. Horowitz: Defendants' Exhibit No. 18 contains several documents. It has what is marked Defendants' Exhibit "C" of Defendants' Exhibit 18, which was identified by the witness as the Navy plan which was involved. When the Navy made this certificate they include two other documents, and I want to offer them and tell the Court what they are. This is under the seal of the Navy. The first page of this exhibit is a letter dated May 18th, 1942—which was the date of the policy—in which the Navy approved the awarding of this insurance on the Comprehensive Rating Plan to the Travelers Company. The second is a copy of the contract referred to as Contract NOY-5493 for the construction of the Naval Training Station [170] for thirty thousand men at Farragut, Pend Oreille, Idaho. Exhibit marked Exhibit "C" of Defendants' Exhibit 18 is the plan itself, and I offer these, and each and every part of them in evidence as Exhibit 18.

Mr. Whitla: I object to the letter written as not being material and not binding on us in this case. It is wholly incompetent for any purpose whatever. This is the first time I have seen this exhibit, and

(Testimony of George E. Peterson.)

I think I should have a little time to look it over. As to the Comprehensive Rating Plan, we object to its introduction for the reason that this plan by its terms specifically provides several methods of handling insurance. I have one copy that they furnished to me, and it is a little different. As I say, I would like a little time to look this contract over. It is the first time I have seen this at all.

Mr. Horowitz: It is the same thing that you have been furnished, the same thing exactly.

Mr. Whitla: I object to it as it provides for several different plans of handling insurance.

The Court: I think I can shorten this. You gentlemen will just argue between yourselves. I will admit it, if that is the only objection, reserving the ruling, and my decision as to its materiality and legality.

(Further remarks of counsel not transcribed.)

(Whereupon, Defendants' Exhibit No. 18 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, referring now to this exhibit No. 18, will you please turn to the portion which makes provision for the employment of an insurance adviser and fixing his duties?

A. Here it is. (Indicating.)

Q. You are referring now to Defendants' Exhibit marked "F" of this Exhibit 18?

A. Yes, sir.

Q. Now, will you refer to the plan itself and point out wherein the insurance adviser is pro-

(Testimony of George E. Peterson.)

hibited from receiving any compensation from any insurance carrier?

Mr. Whitla: We admit that it is in there.

Mr. Horowitz: Will you admit that it is at the end of paragraph number ten?

Mr. Whitla: Yes; I have it marked right here.

Q. (Mr. Horowitz, continuing): Now, with reference to the bond filed with the Industrial Accident Board, was any commission paid in connection with that? A. No, sir.

Q. Was any premium charged the assured?

A. No, sir.

Q. Turning now, Mr. Peterson, to the Bozanta Tavern [172] policies shown in Exhibit No. 8—Defendants' Exhibit 8, can you by referring to that exhibit call the Court's attention to wherein the Bozanta Tavern policies appear? A. Yes, sir.

Q. What is the number of the first?

A. That is number UB-908556.

Q. And the number of the second one?

A. That is number HPS-908557.

Q. When these policies were issued—

Mr. Horowitz: Strike that, Mr. Reporter.

Q. When the insurance coverage with respect to the Bozanta Tavern was first issued, was it under Comprehensive Rating? A. Yes, sir.

Q. And then was it cancelled under that plan?

A. Yes, sir.

Q. And then were these two policies taken out?

A. Yes, sir.

Q. Who produced the business?

(Testimony of George E. Peterson.)

A. The request for the termination of one and the issuance of the other was from, or came through, the Acme Brokerage Corporation.

Q. To whom? A. To our office. [173]

Q. And were the policies written as a result of that? A. Yes.

Q. Where? A. At Hartford, Connecticut.

Q. And it was placed by whom?

A. The Acme Brokerage Corporation.

Q. With whom? A. With Mr. Butler.

Q. I asked with whom it was placed?

A. With the Travelers.

Q. Where was the writing itself done and the premium charged?

A. At Hartford, Connecticut.

Q. Was a commission paid with reference to these two policies? A. Yes, sir.

Q. What was the amount of the commission?

A. \$12.48.

Q. The policies were issued where?

A. I would like to look at those policies again.

Q. (By Mr. Whitla): Do you have to look at a memorandum to refresh your recollection?

A. I would like to look at them. I have a copy of the policies. [174]

Q. (By Mr. Horowitz): Can you tell where it was written?

A. It was either at Hartford or New York.

Q. It was either at Hartford or New York?

A. Yes, sir.

Q. What was the premium on that, again?

(Testimony of George E. Peterson.)

A. The policies didn't last long—they only ran from January 1st to April some time.

Q. Was there a return of the premium in this as a result of the cancellation? A. Yes.

Q. And was there ever a return of the commission? A. No; no return.

Q. You mean to the risk?

A. Yes, sir; the unearned commission would be returned, that is by the agent to the assured.

Q. The actual commission was twelve dollars?

A. Yes, it seems to be \$12.48. I have a breakdown on that somewhere.

Q. Can you locate it, whatever data you have, and see if you can refresh your recollection whether there was a return of the commission after the initial commission was paid? A. To whom?

Q. Well, it was to the Acme Brokerage Company. [175]

A. None.

Q. In any case, the net commission received by the Acme Brokerage was the amount you testified to? A. Yes, sir; \$12.48.

The Court: How was this brokerage company paid for doing this work?

A. They were paid by Walter Butler Company—I am not speaking about these two, but the War Projects Rating Plan provided what they were to have under the War Rating Plan.

Q. (Mr. Horowitz, continuing): Do you know what that was?

(Testimony of George E. Peterson.)

A. No, but I could figure it though, but we seldom see it.

Q. Would you know? A. No, sir.

Q. It was between the contractor and the insurance adviser? A. Yes, sir.

Q. And would be subject to the rules of the Navy?

A. This plan sets up a table of fees that are permissible. The contract and contractor have to conform with that, otherwise he is not reimbursed.

The Court: Whatever fee was paid was taken into [176] consideration by you in fixing the premium? A. No, sir.

The Court: And has nothing to do with fixing the premium?

A. No, sir; the plan was set up in such a way that it was entirely exclusive of any commissions. I think the contractor had to reach an understanding by an agreement, a written agreement, with the adviser of his choice, subject, of course, to the Navy approving it. He was permitted to pay a certain fee.

Q. (Mr. Horowitz, continuing): Is there any relation between the amount paid the adviser and the premium paid for that insurance by the contractor?

A. Yes; there is a table of values that they follow.

Q. My question is, Does this amount of premium charged the assured in any wise depend on the amount paid by the contractor to the insurance adviser?

(Testimony of George E. Peterson.)

A. No, but the fee of the adviser is predicated on the size of the risk.

Q. So far as the carrier is concerned they don't know what is?

A. I don't know what fee was paid on this job. I didn't have anything to do with it.

Q. This fee that is paid to the contractor by the adviser, [177] is that reimbursable under the contract?

A. I understand that the plan provides for it.

Q. Are you familiar with the practice of the defendant companies when an arrangement is made in the field for the payment of a resident agent,—the payment of a resident agent for his countersignature whereby one department notifies another department in the company?

A. Yes, sir; I am. I have occasion to refer to it.

Q. With respect to the period in 1936, were you with the company at that time? A. Yes, sir.

Q. How long had you been with the company at that time? A. About twenty-six years.

Q. At the time in question, which was September or October, 1936, what was the practice of the company?

A. With respect to notifying the department issuing checks as to the arrangement made in the field?

Q. Yes.

A. It is the function of the agency's staff, they inform the agency assistant secretary. He does not issue the checks; he has no control over the money,

(Testimony of George E. Peterson.)

except by directing the company auditor as to the contract which has been entered into by the field man, and he authorizes the auditor, telling him sufficiently about it to justify him [178] in issuing checks for the account, and it is a continuous performance.

Q. You have a memorandum issued by the appropriate officer, that is, the home office official to the auditor? A. Yes, sir; I do.

Q. I hand you what has been marked as Defendants' Exhibit No. 22 for identification, and I will ask you if that is the memorandum you testified to?

(Whereupon document referred to was marked Defendants' Exhibit 22 for purposes of identification.)

A. Yes, sir; it is.

Q. (Mr. Horowitz, continuing): Was that in the regular course of business, the making of a memorandum of that kind? A. Yes, sir.

Q. Was that done in accordance with business practice of the company? A. Yes, sir.

Mr. Horowitz: I offer Exhibit No. 22 in evidence at this time.

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial. It apparently is made at the home office back in Hartford, and is apparently made on information that he received from the field representative in this section of the country. It is improper; it is hearsay; they have, [179] it is

(Testimony of George E. Peterson.)

wholly immaterial for any purpose, and would be hearsay of the worst kind.

Mr. Horowitz: We are permitted to offer explanatory evidence. I am relying on the statute for that.

The Court: It seems to me that they are recognizing the Idaho law in part as to the policies having to be countersigned by an Idaho agent, or agents. I think possibly this should be admitted, because, as I say, they have recognized the Idaho law in part, at any rate. This statute does not provide any penalty for a violation of the statute. Possibly there are no remedies for doing that. Here the testimony seems to show that the companies, before they started to do business, felt that they must have an agent to countersign these policies, and still there seems to be a scheme here to evade the law. I believe I had better admit this in evidence.

(Whereupon Defendants' Exhibit 22, for identification was admitted in evidence.)

Mr. Horowitz: The exhibit admitted in evidence was a document dated October 15th, 1936, addressed to Auditor Flynn to the effect that Eugene H. Ware Company was appointed agents at Coeur d'Alene, Idaho, and that an arrangement was made to countersign the Idaho business produced by non-resident agents and brokers, and an agreement was made to pay five dollars per month for the service. The document is written [180] and the name typed in "C. E. Ferree, Assistant Agency Secretary."

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Subsequently to this letter of October 21st, 1936, which is in evidence, were risks submitted to Mr. Ware for countersignature? A. They were.

Q. That is on out-of-state business?

A. Yes, sir.

Mr. Horowitz: I have another exhibit here, No. 23. It, too, happens to have various documents in it. The first document I wish to offer in that is a letter dated June 29, 1942, in which the Navy approves the Travelers Insurance Company on the War Projects Rating Plan and states that the premium thereunder is reimbursable under contract NOY-5493. In addition to that there are some matters showing the Navy's regulations. They are subsequent to the dates involved here. I would like to offer this one letter.

(Whereupon, documents referred to were marked Defendants' Exhibit 23 for purposes of identification.)

Mr. Horowitz: I offer in evidence now exhibit marked 23-A.

Mr. Whitla: We object to it is incompetent, irrelevant and immaterial for any purpose whatever in connection with this case. [181]

The Court: I am inclined to agree with you, but I will admit it subject to the objection.

(Whereupon Defendants' Exhibit 23-A for identification was admitted in evidence.)

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, if the commission is payable to the countersigning agent, or was payable to the countersigning agent, in 1942 and 1943, would it have been possible for the insurance company to write this insurance under the War Projects Rating Plan?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial. It is not a question of evidence, but a legal question.

The Court: He may answer.

Q. Would that have been possible?

A. No; it would not have been.

Q. Assuming that the various insurance companies, such as the Travelers on out-of-state business was required to pay a commission to the producing agent and the same amount to the countersigning agent in Idaho, would it be possible for such various insurance companies to compete with companies in Idaho not required to pay such a commission?

Mr. Whitla: We object to that. There was no commission paid to anyone outside the state.

The Court: The Court has some testimony before [182] it that the matter was handled by a brokerage company. Certainly, they didn't handle it for nothing. Someone paid for it, no doubt. The amount must have been paid, even if it was paid by the Butler Construction Company.

(Further remarks by counsel and Court not transcribed.)

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): Mr. Peterson, in the insurance business world are there people who are engaged in the business of being insurance analysts who are employed by concerns regarding their insurance policies?

A. Very definitely, there is, and it is becoming increasingly popular.

Q. In connection with the compensation, who pays that compensation for the analyst?

Mr. Whitla: I object to this as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I have never known where the insurance company would hire outside people to make such an analysis. It is quite the contrary. Concerns that become interested in their costs for some reason or other, they want to know what their insurance costs are, and that is true even with self-assured concerns, or with carriers. I know of one company, —

Q. (Mr. Horowitz, interposing): Who pays them for that [183] service?

A. The assured. In this instance I have in mind it was a self-insured concern, and the fee was only a nominal one, too.

Q. In the insurance business world is there a type of organization that writes insurance on a non-commission basis? A. Yes, sir; definitely so.

Q. What type is that?

A. The mutual type.

Q. They write insurance without the payment of commissions?

(Testimony of George E. Peterson.)

A. Yes, sir. That is the principle of mutual insurance.

Q. Is that principle different between stock and mutual companies?

A. In that respect, yes. There are others.

Q. When you testified as to the War Projects Rates was the elimination of the commission the thing that made it possible to take advantage of the stock and mutual companies' facilities.

A. That was the major thing.

The Court: We will recess at this time until tomorrow morning at ten o'clock.

May 1st, 1947, 10:00 A.M.

Q. (Mr. Horowitz, continuing): Now, Mr. Peterson, [184] yesterday you dealt with the subject of mutual and stock companies. On the question of commission, what type of mutual company did you have in mind?

A. I had in mind the type of mutuals that are qualified to write this business. They must be of a certain size, and be substantial writers of workmen's compensation insurance.

Q. Can you give the Court some instances?

A. Yes, there is the Liberty Mutual; the Hardware Mutual; the American Mutual; the Employers Mutual of Warsaw.

Q. Are companies such as you mentioned writers of substantial amounts of business?

A. Yes; they are.

(Testimony of George E. Peterson.)

Q. What,—how are the persons who produce that business compensated?

A. Their business come through salaries employees, or from the risk itself.

Q. For the purpose of determination of premiums to be charged in the rate structure in the casualty companies, that is, all the stock companies and others; is account taken of the cost of the acquisition of business, that is, such costs as commissions of the agents? A. Yes, sir.

Q. Now, Mr. Peterson, in regard to the War Projects Rating Plan, after it went into effect were you permitted to [185] take into account the acquisition costs in making the rates?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial, and that is prohibited by the laws of the State of Idaho.

The Court: He may answer, subject to the objection. A. No.

Q. (Mr. Horowitz, continuing): In other words, the rate structure was fixed, excluding the cost of acquisition such as the producing agent's commission, or the countersigning agent?

A. That is right.

Q. With reference to the insurance adviser, were you permitted to take into account in fixing the rates any costs that the contractor would incur in payment for the insurance adviser's services?

A. No. As a matter of fact that was placed outside of the insurance arrangement entirely. It was something between the contractor and the adviser themselves, and that was by their own arrangement.

(Testimony of George E. Peterson.)

Q. Was the insurance adviser under the plan in any way employed by the insurance carrier?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial. The contract shows who the [186] agent was.

The Court: He may answer subject to the objection.

Q. (Mr. Horowitz, continuing): Was the insurance adviser employed by the carrier?

A. No, sir.

Q. Did the carrier have any control over the adviser? A. No, sir.

Q. Was there any certain duty in reference to the adviser,—that is, did the insurance adviser have any duty in the nature of supervision of the way the rates were fixed?

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial and leading.

Mr. Horowitz: May I withdraw the question?

The Court: Yes.

Q. (Mr. Horowitz, continuing): Mr. Peterson, you have testified to certain procedure followed in determining the amount of earned premium. There is in evidence in that connection Plaintiff's Exhibit No. 4, purporting to be a superseding audit, and Defendants' Exhibit No. 9, which is headed "Corrected Audit," to which you have testified, Mr. Peterson, and Defendants' Exhibit No. 10, "Preliminary Settlement Statement". Now, will you please tell the Court whether the computations, the documents, evidencing the computations were sub-

(Testimony of George E. Peterson.)
mitted [187] for clearance to the insurance adviser
in this case? A. Yes, sir.

Q. Could you get any money without getting a
clearance by the insurance adviser?

A. The plan contemplated that he would review
these records, passing then on the questions that he
might have in mind. He might have occasion to
question some procedure. There was correspond-
ence between the adviser and the company in regard
to things that he felt were discrepancies as we re-
ported them.

Q. Please tell the Court whether the correspon-
dence contained in the Cashier's files contain some
between the defendant companies and the insurance
adviser relative to the computations?

A. I think there is some in here,—yes; here is
one (indicating).

Q. That is Defendants' Exhibit No. 17?

A. Yes, sir. And here is more corespondence call-
ing attention to the fact that the adjustment is due,
and they want to know,—

Q. (Interposing): Just tell us, Mr. Peterson,
whether it contains correspondence between the
Travelers Company relative to these three insurance
policies and the insurance adviser?

A. Yes, sir; it does [188]

Q. Now, Mr. Peterson, can you take the plan,—
the War Projects Rating Plan, which is in evidence
as Defendants' Exhibit No. 18, and turn to the form,
or the insurance adviser's agreement which is on
the last page, and tell us what amount the insurance

(Testimony of George E. Peterson.)

adviser's fee would have been if it had been paid by the Walter Butler Construction Company according to the exhibit?

A. I made a calculation—yes, I made such a calculation in anticipation of this request. I have it in my bag. It follows the calculation of the plan and the regulations exactly. The total standard premium,—

Q. (Interposing): Just give me the total figure, Mr. Peterson.

A. A fee of \$10,586.61.

Q. Do you know, as a matter of fact, whether that was paid by the Walter Butler Company?

Mr. Whitla: That is objected to as entirely immaterial.

The Court: I think perhaps it is, but he may answer. A. I don't know.

Q. Did you in fixing the rate for the insurance premium charged the Walter Butler Company add anything in that rate for this sum of \$10,586.61, or any other sum to be paid to [189] the insurance adviser?

Mr. Whitla: Now, we object to this. It is wholly immaterial.

The Court: I think your objection is well taken. However, I will permit him to answer, subject to your objection. A. No.

Q. (Mr. Horowitz, continuing): Did you either pay, or have a contract to pay, any insurance adviser in this case anything for services?

Mr. Whitla: We make the same objection.

(Testimony of George E. Peterson.)

The Court: He may answer. A. No.

Q. Was the Acme Brokerage Company, the adviser on these three policies, insurance adviser on any more War Rating Plan insurance written by the Travelers Company? A. No.

Q. Did the Travelers fix any rate of commission to any one on these three policies under the War Projects Rating Plan?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No.

Q. Mr. Peterson, if this business has been placed in [190] Idaho, this business covered by the three policies here, under the War Projects Rating Plan would any commission have been payable to any producing agent under that plan? A. No.

Mr. Whitla: We object to that. He has gone into this before. It is repetition.

The Court: The answer is in the record. It may stand.

Q. If the business embraced by these three policies had been placed in Idaho would the insured have been required to have an insurance adviser under the plan? A. Yes, sir.

Mr. Whitla: That is objected to as a conclusion of the witness.

The Court: Yes, it is in the contract,—I believe that is in the contract. The answer may stand.

Q. Do you know, Mr. Peterson, what the practice of the Travelers Companies is with respect to countersigning risks, irrespective of the local law?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. What is that practice?

Mr. Whitla: Objected to as immaterial.

The Court: He may answer.

A. The practice of the Travelers is, and has been, to clear the policies covering specific risks in all [191] outside states in that particular state for countersigning, that is, to send them out to be countersigned.

Q. Does that depend on the provisions of the local law? A. That is the general practice.

Mr. Horowitz: I believe that is all the direct examination.

The Court: I have a question I would like to ask this witness at this time: Your stipulated premiums are recited at \$246,126.56 in connection with these policies; the stipulation then says that it is subject to final adjustment. I would like to know if that adjustment is to be made.

Q. (Mr. Horowitz, continuing): Will you explain what final adjustment is contemplated, Mr. Peterson?

A. It is called for in the plan.

Q. Do you want Defendants' Exhibit No. 11 to look at? A. Yes.

Q. And here is the stipulation also, Mr. Peterson.

The Court: Is the adjustment up or down?

A. This adjustment of \$246,126.56 is the final adjustment as called for by the plan, but it has not yet cleared the companies' records, nor has it been

(Testimony of George E. Peterson.) cleared by the Navy Department as such, and consequently when this is negotiated as a final settlement, not earlier than six months after the preliminary settlement, and on account of this case final settlement has been deferred, but on the present indication is should settle at about \$246,000.00, and if these are used it will be about that figure.

The Court: What have you received in premiums?

A. \$253,857.39, thus indicating a premium return of \$7,730.83 in this tentative settlement.

The Court: That is all I care to ask.

Mr. Horowitz: That is all.

Cross-Examination

By Mr. Whitla:

Q. Taking this statement that you have introduced in evidence that carries on the face of it purported final release dated the 23rd of October, 1945, why was that not completed at that time?

A. I think I have answered that question.

Q. But I am asking it again.

A. This case was pending in this Court in Idaho, and we asked that this matter be deferred until the matter was cleared out here.

Q. In other words, the fact that the claim for premium was pending had something to do with it,—I mean the claim for commission?

A. It wasn't settled, and as a matter of fact we did not know, not having had a case like this before, just where [193] we would stand. There is no pro-

(Testimony of George E. Peterson.)

vision to take care of any penalty that might be imposed by the Court of Idaho, and we asked what the matter be left open to be discussed, that is, so that we might discuss this question at a subsequent date, depending on the action of the Court.

Q. Now, going back to the proposition that you testified that this Cashier's file contained correspondence between the company and the insurance adviser? A. Some of it is there.

Q. Do you have other correspondence with the adviser? I thought you furnished us a complete statement of the matters regarding these policies?

A. Yes, sir.

Q. Then the correspondence is all contained in this file? A. I think it is; yes.

Q. Now, will you take this file and letter all of these matters with the adviser,—letter them "A", "B", "C", and on down so that we can see what the correspondence with the adviser was. Have them properly lettered so that we can identify them.

A. May I ask a question?

The Court: Yes.

A. Do you want the letters from and to the advisers?

Q. (Mr. Witla, continuing): Yes; all of the correspondence. [194] Now, they are lettered "A" to what? A. "A" to "O".

Q. This begins at the back of the file and is built up toward the front? A. Yes, sir.

Q. But the letter "O" is at the back?

A. Yes.

(Testimony of George E. Peterson.)

Q. So that the first letter was one by the Assistant Cashier of the Travelers Company addressed to the Acme Brokerage Company dated October 15th, 1942? A. That is right.

Q. And it was regarding some classification that they had reported which was in error, and you sent it to him calling attention to that?

A. Yes, sir.

Q. And it amounted to a total of \$14.47 that you had overpaid?

A. The result of an audit and involves a credit of \$14.47.

Q. You sent that to the Acme Brokerage Corporation to show that there was an overcharge to the Walter Butler Company of that amount?

A. Yes.

Q. Now then the next is marked with a letter "N" and is dated October 26th, 1942, sent by Walter Butler Company [195] to the Acme Brokerage Corporation to where you charged \$222,884.68, and the correct amount was \$222,484.68?

A. I might mention here, —

Q. (Interposing): You can answer this question that that is what it is about?

A. Yes; it is.

Q. That was from you to the Acme Brokerage Corporation?

A. No; that was a letter from a Mr. Norton to the Acme Brokerage Corporation calling attention to the mistake.

Q. It was from the Walter Butler Company?

(Testimony of George E. Peterson.)

A. Well, Norton was on the payroll of the Acme Brokerage Company. He was their representative on this project as adviser.

Q. He was in St Paul, was he not?

A. Yes; he was their adviser assisting them in connection with this work.

Q. They found an error of \$400.00?

A. When it was carried forward,—that is right.

Q. You say that he was on the payroll of the Acme Brokerage Company? Now, actually he was an employee of the Walter Butler Company?

A. He was on the payroll of the Acme Brokerage Company,—probably both.

Q. He was with them a long time? He remained with them [196] afterwards? A. I think not.

Q. Now, Mr. Peterson, this letter which is marked "M" addressed to the Acme Brokerage Company, signed by a Mr. Mallory, Assistant Cashier of your Company, and it is relative to a typographical error in regard to a roofing bill, or a premium on roofing? A. That is right.

Q. And that was dated October 30th, 1942?

A. Yes, sir.

Q. And the next one was under date of December 4th, 1942, and is marked with the letter "M" and was from Mr. Mallory to the Acme Brokerage Company of New York, sending them certain audit reports and asking them to forward them through immediately so they could arrange for the payment? A. That is right.

Q. That is marked with the letter "L"?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. The next is a letter from your Assistant Cashier to the Acme Brokerage Company under the date of January 4th, 1943,— that is marked with the letter “K”, including a bill for these policies and asking their cooperation in getting payment of that? A. Yes, sir. [197]

Q. The next is marked with the letter “J”, and is a letter dated March 6th of 1943, signed by A. W. Terhune, Branch Accountant, and it is addressed to the Acme Brokerage Company, indicating that some \$75,000.00 was due, and asking for some action on it?

A. I call your attention to the fact that some reference is made there to a revised figure, and asking that it be disposed of.

Q. In a few days, in fact 4-5-43 you got a remittance for the exact amount? A. Yes, sir.

Q. And that was on the charge account in which you billed them for some \$624,000.00 and they had remitted five hundred and some odd thousand, and all of this is shown by the Plaintiff's Exhibit “L”?

A. But the point was that there was something *that* our auditor to clear up. That was referred to in that paragraph. That is one of the times that it was mentioned.

Q. But your bill of March 6th showed that you had billed them for \$624,330.70, and you had been paid \$548,657.75, leaving a balance due of \$75,672.95, and by this letter, which has been marked “J” you wrote them in regard to that balance and asking for payment?

(Testimony of George E. Peterson.)

A. And referring to the explanation that was given by the [198] auditor of some question that had arisen, the details of which was not in this file.

Q. You got a remittance promptly?

A. Yes, sir.

Q. Now, the next letter is marked with the letter "I", in which you enclose some statement amounting to \$22,316.80, and asked for prompt remittance?

A. Yes, sir.

Q. That is dated when?

A. April 10th, 1943.

Q. And on that you got prompt remittance of that amount, didn't you, as shown by Plaintiff's Exhibit "O" dated 5-3-43,—wasn't remittance sent to you in accordance with your letter of April 10th calling your attention to the exact item?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir; that is on May the third.

Q. You wrote on April 10th, and remittance came through on May 3rd? A. Yes, sir.

Q. And then on April 16th you wrote them sending certified copies of some bills that were sent in?

A. There were some telephone calls referred to in this letter. [199]

Q. Yes; they wanted some certified copies of these bills to make some reports?

A. I suppose that is so. That is what we sent them.

Q. That is all that letter refers to?

A. It refers to the telephone calls.

(Testimony of George E. Peterson.)

Q. The next letter, marked with the letter "G" was by you to the Acme Brokerage Company sending the cancellation of this policy WUB-863386,—it was the compensation policy—and policy WSLG-863387, as well as the other policy WSLA-863388.

A. Yes.

Q. You also sent that same notice to the Navy?

A. And to Walter Butler.

Mr. Horowitz: What is the date of that letter?

Mr. Whitla: June the 29th.

Q. (Mr. Whitla, continuing): You sent that same letter to the Navy and Butler and all of them?

A. I assume so.

Q. Now, the next letter was dated August 3rd, that is marked with the letter "F," and that was to the Acme Brokerage Company by Mr. H. P. Hunninghous, Assistant Cashier, in which you sent copies of certified statements and audits for various periods showing irregularities on the premiums, and showing a balance of \$675.45, and asking for payment? [200] A. That is right.

Q. Then on August 18th, 1943, you again wrote them regarding these same bills, and told them there would be some refund as soon as they remitted the \$675.46? A. Yes.

Q. On August 23rd you again wrote them, or, rather, they wrote you advising you that they sent the checks and stating they would appreciate the refund so that they could transmit it to the assured?

A. Yes, sir.

Q. And you wrote them advising that as soon as

(Testimony of George E. Peterson.)

the check was made out you would then send the check, or, rather, as soon as the statement was made, you would send the check? A. Yes.

Q. And that is marked with the letter "C", and dated August 25th? A. Yes, sir.

Q. And the letter marked "B", you wrote under date of August 30th, 1943,— that is also marked Defendants' Exhibit 17, in which you sent them your check for \$440,985.33, together with five sets of figures showing how you had computed that amount? A. Yes, sir.

Q. And that is the refund check that is shown in the [201] stipulation for which you ask credit in this case? A. I guess so.

Q. You have no other check of that amount?

A. I am not verifying the exact amount.

Q. On August 31st you sent the data to the Acme Brokerage Corporation supporting that preliminary adjustment? A. Yes, sir.

Q. And that constitutes the entire correspondence between your company and the Acme Brokerage? A. From the Cashier's file.

Q. Do you have any other file?

A. I don't know, but there was probably information given verbally.

Q. Do you have any other file?

A. No other file.

Q. All of these computations, and all of these matters, except the ones from Norton, were made by your company to the Acme Brokerage?

A. Yes, sir; they were.

(Testimony of George E. Peterson.)

Q. During all of that time you just had one letter from the Acme Brokerage to yourselves?

A. As far as I know.

Q. Now, Mr. Peterson, as to these mutual companies to which you referred, first take the Liberty Mutual, where [202] does that company operate?

A. That is country-wide.

Q. In this section?

A. I cannot answer that specifically, but it is a matter of publication, such as given by the Spectator, and also Best.

Q. The biggest mutual company is the Lumberman's Mutual of Chicago?

A. That is probably true; yes.

Q. They do about fifty,—about five hundred fifty million in premiums?

A. It is a matter of record.

Q. They have agents all over the country, and they pay them a commission?

A. They operate some on a commission basis.

Q. Best is a standard work? A. Yes, sir.

Q. It shows the various mutuals and what they pay for commissions, and all about it, and shows all the costs taken from their officials reports?

A. Yes, sir.

Q. Do you know of any mutual company handling this class of business operating in this section of the country that does not pay a commission to their agents? [203]

A. I would have to see where they operate specifically. Some of those I mentioned are on a

(Testimony of George E. Peterson.)

country-wide basis, but to what extent they operate in Idaho I am not in a position to say without referring to the record.

Q. Now, this other mutual company that you mentioned,—I believe the Hardware Mutual. It is an organization that was started by the Hardware Dealers organization, or the hardware organization to handle their own insurance?

A. Well, they have expanded greatly. There were many others started in the same manner. There is the Bakers Mutual, and the Butchers Mutual, but the name doesn't mean anything any more. They do a large business outside of the organization as it originally was.

Q. The American Mutual, where does that operate? A. That is country-wide.

Q. Where does it operate?

A. Its office is at Boston.

Q. Is there a mutual in New York that is a subsidiary of the Lumbermen's Mutual?

A. I don't know about that.

Q. And the Employers Mutual of Warsaw, where is that from?

A. That is Warsaw, Wisconsin.

Q. Do you know where they operate? [204]

A. I know they had war contracts in the middle west.

Q. Do they keep agents?

A. They do not operate on an agency system as such. If you will refer to the record,—

Q. (Interposing): You went through Best?

(Testimony of George E. Peterson.)

A. I went through the Spectator chart.

Q. Now, here is the American Mutual Liability, they wrote thirty-four million in premiums in 1945, and the total amount paid in commissions was \$274,-900, approximately?

A. Yes, sir; that amounted to eight-tenths of one per cent. Now, you take the Factory Mutual Liability Insurance Company of Providence, while it is a smaller company, or write a smaller volume of business, they wrote \$2,423,000 in premiums, and they didn't pay any commissions.

Q. They have salaried agents?

A. I presume so. They have two million worth of business.

Q. Mr. Peterson, every company to develop business has to pay some money to get it developed? It just doesn't come to them out of thin air?

A. That is probably so. Now, here is the Hardware Mutual. They wrote \$16,274,000, in premiums, according to the Spectator, and they paid \$1,870.00, which is very small.

Q. Is the Hardware Mutual the company that writes hardware stores for only members of the Association?

A. They were originally founded as an association. I am [205] under the impression that they branched out considerably.

Q. Are you sure of that?

A. I am under that impression.

Q. Now, the next one is no doubt a great factor, since they rate next to the Travelers, and that is the Liability Mutual of Boston?

(Testimony of George E. Peterson.)

A. They wrote \$75,883,000 in premiums and paid no commissions. There is no record of any commissions. I know from personal contact that they do not pay commissions under any circumstances.

Q. They have salaried agents in the states in which they operate?

A. No; that is the way they operate; now, with respect to particular companies, you can go to the Texas Employers Mutual, who are a local company, and they write some \$7,126,000. That company had commissions of \$9,423.45, or one-tenth of one percent.

Q. That is a concern in Texas that writes for the Employers Association?

A. I think they write outside of the State of Texas.

Q. It is like the Pennsylvania Manufacturers Association?

A. I would not say so. They operate exclusively in the state, but I am sure that the Texas Company is not in that position, or do not write on that basis. [206]

Q. They write for their members only?

A. I don't know. I know you have the Merchants Mutual Casualty that wrote some six million in premiums, but I think the important thing here is the size of the mutual company, and the volume of compensation business they do. That would be the only ones that would handle projects of the magnitude of the Walter Butler Company construction

(Testimony of George E. Peterson.)

out here. While this was not the largest handled during the war, it was good-sized, and they were the ones that I had reference to.

Q. Now, Mr. Peterson, any of these mutuals that are engaged in the general business, that is, practically all of them do have regular agents, and some of them pay the biggest commissions of any companies?

A. You will find that they are the people who are not writing compensation, but devote themselves largely to the automobile field.

Q. How about the Lumbermen's Mutual? Doesn't it write all lines?

A. The Lumbermen's Mutual is the only exception.

Q. Is there several others?

A. Not of that size.

Q. I have them for you in Best, and I will get them for you at noon. Now then, handing you Defendants' Exhibit No. 7, do you have any other contract of any kind with Mr. [207] Ware relative to the countersigning at the rate of five dollars a month, other than the letter you wrote which is Defendants' Exhibit No. 7?

Mr. Horowitz: You mean in any written instrument?

Mr. Whitla: Yes, regarding that five dollars per month.

A. I have to go by that letter. I am not the person who wrote this. I have to rely upon this letter.

Q. (Mr. Whitla, continuing): It is a matter

(Testimony of George E. Peterson.)

of the files,— the information in the files of the Travelers Insurance Company. Do you have any other contract in writing with Mr. Ware regarding the countersigning for the payment of five dollars per month, other than this contained in this letter, which is marked as Defendant's Exhibit No. 7?

A. I cannot answer that question.

Q. Do you know of anything else?

A. This letter refers to a recommendation to the Home Office that the agency be recognized in this manner. It says, "Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency for handling a small amount of countersigning that will be necessary from time to time, I recommended to our Home Office that your agency be recognized in this manner. I am now in receipt of advice that your agency has been approved for this service [208] as of October 1st, 1936, on the basis of a monthly remuneration of five dollars. Payment for the month of October will be forwarded to you as of November 1st,—" I assume from this,—

Mr. Horowitz: I think, your Honor, the letter is the best evidence.

Q. (Mr. Whitla, continuing): You testified that you had a contract by reason of an office memoranda that you introduced?

Mr. Horowitz: I offered that in evidence.

The Court: I think this witness is able to take care of himself, and I think this cross-examination is proper.

(Testimony of George E. Peterson.)

Q. (Mr. Whitla, continuing): This Defendants' Exhibit No. 22 that you introduced in evidence, which is dated October 15th, 1936, do you know anything about any contract upon which that is based, other than the letter Defendants' Exhibit No. 7? A. I cannot answer that question.

Q. You can answer whether you know anything about it?

A. I don't know about it. My testimony in regard to this, and my knowledge of the procedure, this was a Home Office matter. That is the fact that I dealt with, and I am competent to do that.

Q. This refers to some other matter in the Home Office. Now, you would be competent to handle that, provided they received word from the Home Office? [209]

A. That underlies this here (indicating), and I am not in a position to answer.

Q. Defendants' Exhibit No. 7, so far as you know, is the only proposition you have regarding the five dollars for countersigning?

A. So far as I know, of my personal knowledge.

Q. And of course for the purpose of this case you have endeavored to find out all the information regarding this which you could?

A. Not necessarily.

Q. You mean to say you came here without trying to find out about these matters?

A. I had certain functions to perform, and that is the matter that I am here on.

Q. And one of those matters was to try and

(Testimony of George E. Peterson.)

prove this contract with Ware for five dollars a month? A. I had nothing to do with that.

Q. You brought everything you could find in regard to that?

A. I was asked to just vouch for the authenticity, or to the authenticity of the procedure.

The Court: Is there a written designation of Mr. Ware?

Mr. Whitla: Yes; it is pleaded, and I think it is [210] attached to the complaint as an exhibit, and admitted by the answer.

The Court: I believe we will recess at this time for ten minutes.

May 1st, 1947, 11:10 A.M.

Q. (Mr. Whitla, continuing): Mr. Peterson, the two defendants, the Travelers Insurance Company, and the Travelers Indemnity Company, are joint companies? They are associated and use the same office and the same people work for them?

A. Yes.

Q. They occupy the same office building and everything of that kind? A. Yes, sir.

Q. In this case the Indemnity Company put up the bond, the Insurance Company writes the insurance? A. Yes.

Q. You have seen the letter from the Industrial Accident Board calling attention to the fact that they had the matter referred to them in regard to the fact that the Insurance Company had no right to write compensation policies? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. You knew about that? A. Yes, sir.

Mr. Horowitz: The stipulation admits that the defendant companies had the right to write these policies, and I submit it is immaterial.

The Court: He may answer.

A. I saw the correspondence.

Q. (Mr. Whitla, continuing): Can you give us any explanation as to why a company not authorized to write this was so writing?

A. The two companies are one and the same for all intents and purposes, and it was intended to write this in accordance with the requirements. The bond was furnished in compliance with the law so as to qualify them.

Q. That is the only explanation that you know of? A. Yes, sir.

Q. I was just wondering if there was any reason why it should be done that way other than that explanation? A. I don't know of any.

Q. There has been introduced in evidence two accounts, from April 10 to January 2nd, 1943, and another from April 10 to July 25, 1942. The first one, from April 10 to July 25th is marked "Corrected Account." Now, what is that a correction of, or what is it corrected from?

A. It is a correction of the previous audit for the same period. [212]

Q. Do you have some book that these accounts were taken from?

A. Well, the books are the records as taken from the assured's books by our field auditor that services the risk.

(Testimony of George E. Peterson.)

Q. In compensation insurance you send an auditor out to audit the payrolls of the assured?

A. Yes, sir.

Q. You get the classification of the men's work and you bring it to the auditor and you get the number of hours in that line of work that all the men have worked, and you multiply that by the rate and that is the charge? A. Yes.

Q. And that is the way you arrive at the compensation premium? A. Yes, sir.

Q. That is the regular rate of insurance, and that is the procedure that insurance companies follow? A. Yes.

Q. There was some correction made from the original audit, can you tell what it was?

A. There were some errors on the assured's books. You see we had an auditor on this job continuously. He lived right on the job, and many of these things were called to his attention by Butler's bookkeeper, and in reviewing the [213] records an opportunity was given to correct the errors, and this represents the correction.

Q. This was superseding,—does it supersede No. 9,—Exhibit No. 4, does it supersede Exhibit No. 9?

A. In scope, it does. It extends beyond that period. It goes to a period of time which also includes that.

Q. As a matter of fact, Exhibit No. 9 is included in Exhibit No. 4? It is included in Plaintiff's Exhibit No. 4 which brings it to a later date?

A. That is right.

(Testimony of George E. Peterson.)

Q. Then No. 9 is of no use in this case for any purpose?

A. I think so. It might raise a question in regard to premiums as earned between certain dates.

Q. It is just a period accounting instead of a full accounting? A. That is right.

Q. Do you know of any reason it would make any difference in this case?

A. No; I don't know of any.

Q. Is there any reason why when they submit a corrected one why they didn't submit the original one?

A. Well, it is customary that the last one is the one that you go by.

Q. You submitted a corrected one. That was a periodical [214] one, but you did not submit the original?

Mr. Horowitz: I object to this going in, because it simply encumbers the record and is of no value.

The Court: He may continue.

Q. (Mr. Whitla, continuing): I will ask you, do you know of any reason why Defendants' Exhibit No. 9 is of any material value in this case?

Mr. Horowitz: I think this is a legal question, rather than a question for the witness.

The Court: He may answer.

A. You may want to determine the premium for a certain period, and this would permit the doing of that.

Q. Do you know why that should be done in this case?

(Testimony of George E. Peterson.)

A. You have a break-down of the payroll by periods for the purpose of splitting your returns to the Industrial Commission.

Q. That covers what date?

A. July 25th, 1942.

Q. Did you make any return to the Industrial Accident Board covering that period, showing any amount of premium earned up to that time?

A. It is one of the reasons that you would need it.

Q. You make your report to the Accident Board, but you don't make it on the earned premium, but the premium collected [215] to a certain date?

A. That is right.

Q. And that has nothing to do with the premium collected? A. That is right.

Q. Then it would not be of any benefit in making a return to the Industrial Accident Board?

A. Part of it would, depending on when the premium was paid.

Q. Do you know when the premium was paid?

A. No, sir.

Q. Now, just so there is no misunderstanding, Plaintiff's Exhibit No. 4 is a complete payroll audit corrected so far as you know on the Walter Butler Construction Company under the policies in controversy here?

A. For a part of the period, April 10 to January 2, 1943.

Q. You have this carrying it down to April 13, 1945? A. That is right. It is complete.

(Testimony of George E. Peterson.)

Q. The policy in this case, when is Defendants' Exhibit No. 8, is shown here as Plaintiffs No. 1, is it not? A. Yes, sir.

Q. And that contains the insurance agreement between the parties made on that date?

A. Yes, sir; on the compensation.

Q. Omitting the certificate at the top of the policy, [216] I call your attention to the various endorsements on it, beginning on page one, and now then, Mr. Peterson, that is nothing but the printed form,—no endorsements? A. That is right.

Q. Page number two is a printed form and has the names of the officers of the company printed on it, and countersigned by Mr. Ware?

A. That is right.

Q. Beginning with the matters on the policy at the time it was written, the declaration of the policy and the number of the policy, or the endorsements, the first endorsement is number 3013?

A. Yes, sir.

Q. And the next one is endorsement, or schedule, 2921, and that is referred to on the policy?

A. Yes, sir.

Q. And the next one is 2776? A. Yes, sir.

Q. And then following it down, the next endorsement is 3031 again? A. Yes, sir.

Q. On the back of the policy it gives the name of the company issuing it, and the date of expiration? A. Yes, sir. [217]

Q. And the person to whom it is issued?

A. Yes, sir.

(Testimony of George E. Peterson.)

Q. There is nothing in that policy to endorsement No. 3016. No. 3016 is not mentioned in that policy, is it, that is, leaving out the certificate at the top, which was not a part of the policy?

A. That is the certification of the assistant secretary, and it certifies that 3016 is a part of the policy.

Q. That was put on later. There is nothing in the policy itself showing 3016 as an endorsement?

A. I don't see why you should separate it.

Q. That was for the purpose of certifying the papers for use in this case?

A. That is the customary procedure.

Q. But that is not a part of the policy?

A. This endorsement was on there.

Q. It is like the other endorsement that you have which is numbered and certified as correct by the auditor, or the assistant secretary? A. Yes.

Q. And in none of the others does it refer to what is in there? A. But it was on there.

Q. I asked you if, without that certificate, there is [218] anything that shows that endorsement 3016 is endorsed on the policy? A. No.

Q. Not a thing? A. No, sir.

Q. Now then, this Defendants' Exhibit No. 19 you say is a binder that was issued,—that is for the casualty insurance?

A. It takes the compensation.

Q. That was issued as of the date it bears?

A. Yes, sir.

Q. That is a regular thing when you issue a

(Testimony of George E. Peterson.)
policy and cannot get the policy out immediately, you issue a binder until the policy can be properly signed and delivered? A. Yes, sir.

Q. And that is what this was issued for?

A. Yes, sir.

Q. And that was the entire agreement up to that time? A. Yes, sir.

Q. And that was submitted to you by the Acme Brokerage Company? A. Yes, sir.

Q. Following that you prepared a policy in the Home Office at Hartford, Connecticut, and sent it to your agent at Coeur [219] d'Alene to be countersigned? A. Yes, sir.

Q. You sent it out in an envelope enclosing another envelope to return it, and asked for prompt service? A. That is the usual procedure.

Q. And you received back this Defendants' Exhibit No. 20 under date of May 25th, returning the three policies signed by E. Thomas?

A. Yes, sir.

Q. She was to sign the policies with Mr. Ware, that is, she had authority to countersign? She was an employee in his office?

Mr. Horowitz: I submit the best evidence would be the power of attorney.

Q. (Mr. Whitla, continuing): The bond was included in this matter? A. It followed.

Q. Wasn't it included, and didn't you ask them to see that the bond was filed with the proper officials of the state of Idaho? A. I think so.

Q. And they returned the policy and sent the bond to the state of Idaho for filing? A. Yes.

(Testimony of George E. Peterson.)

Q. You knew the bond was a prerequisite?

A. Yes, sir.

Q. You sent a wire to hurry up the policy, or something to that effect?

A. I think there was a wire.

Q. Under the date of May 29th you received Exhibit No. 21 stating what they had done, that they had returned the policy in the same envelope, not by airmail but by regular postage?

A. That is correct.

Q. And this letter refers to the three principal policies involved in this case? A. Yes, sir.

Q. Now after this proposition, this writing to the Industrial Accident Board calling attention to the fact that you claimed a refund, you never did anything further?

Mr. Horowitz: That is covered by the stipulation.

Q. (Mr. Whitla, continuing): After the application for the refund you did proceed to file your reports with the state of Idaho for several years, paying one per cent tax to the Industrial Accident Board for compensation insurance?

A. Yes, sir.

Q. And that amounted to a good many thousands of dollars? [221]

A. It amounted to thousands.

Q. You paid five or six thousand dollars after that? A. Something like that; yes.

Q. Now the man, or men, that you paid commissions to for some of the policies issued later was

(Testimony of George E. Peterson.)
the Acme Brokerage, the same ones that had been
Walter Butler's insurance adviser?

A. Yes, sir.

Q. That was a small amount, about \$12.48, I
believe you testified? A. Yes.

Q. And on this insurance rating that you testified
about, I believe you acted on some commission helping
to set up this plan?

A. No, sir; I was appointed to a committee to
administer it.

Q. It was established in 1941 before the war?

A. Yes, I think so.

Q. The comprehensive insurance rating plan
shows August 18th, 1941. Would you say that was
about the approximate date?

A. It was established before that, because the
Navy adopted the plan from the War Department,
or after the War Department. [222]

Q. This is not the War Department plan. They
have a different plan?

A. Well, you cannot tell them apart.

Q. But the two departments have considerable
difficulty about that?

A. No; they are very much the same in major
points.

Q. How long did you act on the committee to
administer this plan?

A. From its inception to the completion of the
war; in fact, we had several meetings after that.

Q. From the inception of the war?

A. No; the inception of the plan.

(Testimony of George E. Peterson.)

Q. On August 18th, 1941?

A. I think it was prior to August, 1941. We had some meetings prior to that with the War Department.

Q. Will you tell us when?

A. We had some meetings with the War Department after the close of the war.

Q. Well, Mr. Peterson, at the same time you were acting on the committee you were also assistant secretary of this department that you mentioned of the defendant company?

A. I became secretary of the department.

Q. You held that position during all of the time that you were on the committee to administer these rules, or this [223] plan? A. Yes, sir.

Mr. Whitla: That is all at this time.

Redirect Examination

By Mr. Horowitz:

Q. Now with reference to this committee, just give an idea to the Court of what it was—will you tell us what other representatives were on the committee?

A. Representatives from mutual and stock companies. They were there in equal representation. It was set up at the request of the War Department and joined later by other Government agencies adopting the plan, and they attended these meetings. The understanding was with the Army and Navy and these other agencies that they would attend.

(Testimony of George E. Peterson.)

Q. What was the practice with reference to the meetings?

A. No meeting would be held until there was in attendance representatives of these agencies.

Q. What companies had representatives there on that committee?

A. The Liberty Mutual, the American Mutual, the Lumbermen's Mutual, the Globe Indemnity Company, the Employers Liability Insurance Corporation and the Travelers Company.

Q. Is there any secrets as to who the individuals were, [224] and who they represented?

A. No, sir.

Q. You mentioned, I think, that there was an equal representation of the mutual and stock companies? A. Yes, sir.

Q. And what were the stock companies?

A. The Employers, the Globe and the Travelers.

Q. The Court asked you about the sum of \$7,730.00 shown as still owing as a result of the computations. Is that some of the returned premium corresponding in character to the \$440,000.00 some odd dollars?

A. It is developed in the same manner.

Q. Didn't the companies concede that that was still owing the Navy as assignee? A. Yes, sir.

Q. If in this case the Travelers were required to pay the commission, would they be reimbursed?

Mr. Whitla: That is objected to as incompetent, irrelevant and immaterial, if the Court please.

The Court: He may answer.

(Testimony of George E. Peterson.)

A. I have been told no.

Q. By whom? A. By Navy officials.

Q. In your testimony relative to the letters in the [225] Cashier's file, you were about to answer, and you started to say you knew personally, or that you knew about something and you were interrupted. Was there something that you wanted to add relative to the communications?

A. I wanted to bring out the fact that being in Hartford and having a private wire between our New York office and Hartford, the procedure was to contact me personally, and I was contacted by the New York office, at the request of the Acme Brokerage Corporation to give them some information.

Q. Mr. Whitla said something about the Lumbermen's Mutual writing a premium business of five hundred and fifty million? A. Yes.

Q. What was the name of that company?

A. The Lumbermen's Mutual Casualty. There are five or six—

Q. (Interposing): Mr. Peterson, will you just refer to the publication that you testified to and turn to the Lumbermen's? A. Yes, sir.

Mr. Whitla: That was Best's Manual that I referred to.

Q. And—

Mr. Horowitz: This points out that it did [226] \$36,120,981.00 in premiums—about thirty-six million or a little over. It is not important but I wanted to clear that up.

(Testimony of George E. Peterson.)

Q. (Mr. Horowitz, continuing): And you said something, Mr. Peterson, also about some companies operating on both bases. What did you mean by both bases?

A. Mutual companies use both the commission plan and private solicitation with their own employees.

Q. Now, will you refer to Defendants' Exhibit No. 9, and to Plaintiff's Exhibit No. 4? Defendants' Exhibit No. 9 is known as the corrected audit, and Plaintiff's Exhibit No. 4 is known as the superseding audit. You testified, I believe, that Defendants' Exhibit 9 covers part of the period covered by Plaintiff's Exhibit No. 4?

A. Yes, sir.

Q. Are there differences in figures in some instances between Defendants' Exhibit No. 9, and Plaintiff's Exhibit No. 4 for the same period?

A. Yes.

Q. In order to get the history of this transaction as it developed day by day under these three policies, would it be necessary to get both the corrected audit and the superseding audit?

A. It would seem proper and desirable. [227]

Q. Do not these two audits constitute steps in the computation of the premiums under these three policies?

A. In the premiums, yes, sir; and they facilitate the premium billing.

Q. If you want to know the amount of the interim payments under a period you look at one audit?

A. Yes, sir.

(Testimony of George E. Peterson.)

Q. And if you want to know it for a different period you look at the other? A. Yes, sir.

Q. Now, referring to Exhibit No. 8 containing the policies in question, there is a certificate on the copy which was furnished, and which appears on that policy. Will you tell us from what Home Office records were these made up?

A. From the absolute duplicate of the original policy.

Q. Have you that Home Office record?

A. Yes, sir.

Q. Will you please produce it?

A. Yes, sir.

Q. Now, turn to it—I hand you Defendants' Exhibit No. 24, marked for identification. Will you tell me what it is?

(Whereupon Defendants' Exhibit 24 being document referred to was marked for identification.)

A. It is an exact duplicate made from which the original [228] policy was made.

Q. What is the Home Office practice in reference to keeping the Home Office record which shows the policy endorsement?

A. The practice is to retain an exact duplicate in the Home Office showing in the endorsement space what is the endorsement attached to the original policy at the time of the issuance.

Q. Was that instrument, Exhibit No. 24, made in the regular course of business pursuant to the practice that you testified to? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Has that instrument been in your Home Office since the policy was issued? A. Yes, sir.

Q. And does that refer to endorsement 3016 as having been attached to the policy at the time of its issuance? A. It does.

Mr. Horowitz: I offer exhibit No. 24 in evidence at this time.

Mr. Whitla: This is an office copy of the policy?

A. It is an exact duplicate of the office copy of the printed-in portion of the policy.

Mr. Whitla: Why is it that this policy which you [229] submit as a copy is not the same as this (indicating)?

A. This is a skeleton; the other is the policy.

Mr. Whitla: The policy does not contain the same things that are contained, and this is what you say is the Home Office copy of the policy?

A. It contains everything except that which is for Home Office use.

Mr. Whitla: This endorsement was not on the original policy as sent out?

A. It is not the practice.

Mr. Whitla: That endorsement referring to the number of the endorsement was not on the original?

A. Not noted on the policy. Neither was the other matter there.

Mr. Whitla: This was something that someone in the office put on after the policy was issued?

A. No; it is put on before the policy was issued.

Mr. Whitla: It is put on before the policy was issued? A. Yes.

(Testimony of George E. Peterson.)

Mr. Whitla: On your Home Office records?

A. This is the original. Under the way we operate the policy is not the original.

Mr. Whitla: It constitutes the contract which you [230] give to the assured?

A. This instrument is typed with a certain type of ribbon that permits us to put in what we call a jelly machine, and then we run out as many copies as we want, and you can mask out—as we do—any details that are for the Home Office, and this is what comes out of the typewriter. You will find the items—barring the top here (indicating)—is a duplicate of the policy, or, rather, it is duplicated on the policy.

Mr. Whitla: Down to Item No. 1 is what you claim is for the Home Office? A. Yes.

Mr. Whitla: And that was not on the original policy? A. That is right.

Mr. Whitla: We object to this as incompetent, irrelevant and immaterial. It is entirely immaterial regarding the items that are not shown on the policy.

The Court: I will admit the exhibit. I think perhaps you are possibly correct, though.

(Whereupon, Defendants' Exhibit 24 for identification was admitted in evidence.)

Q. (Mr. Horowitz, continuing): Turning now to Exhibit No. 8—[231]

The Court: Before you start, Mr. Horowitz, we will recess at this time until two o'clock.

(Testimony of George E. Peterson.)

2:00 P.M.

Q. (By Mr. Horowitz): Mr. Peterson, there was some testimony given on cross-examination before lunch relative to whether the war rating plan endorsement was a part of the policy. I understood counsel to ask if the endorsement was a part of the policy, and I think you said that it was not.

Mr. Whitla: That it was not mentioned in the policy.

Mr. Horowitz: All right.

Q. At the time the policy was issued, what was the practice of the company in respect to mentioning endorsement numbers, or schedule numbers, in this form of policy?

Mr. Whitla: We object to that. The statute of Idaho requires them to be inserted in the contract.

A. It was the practice of the company to not put on this policy certain endorsement numbers, but to have them on the Home Office copy, as I showed this morning.

Q. Take this first one, this item one, "Walter Butler Company, C.P.F.F., contractor with the U.S.A. and others, as described in endorsement 3013," what was the function of that reference?

Mr. Whitla: We object to this. It is in the policy.

The Court: This man is an expert, and is here as an expert. I will permit him to answer.

Q. What was the function of that reference?

A. To indicate who was to be named, the full

(Testimony of George E. Peterson.)

title of the risk, as it is shown there, the Walter Butler, and others, as described in the endorsement.

Q. Endorsement 3031 is to indicate the additional assured on the policy? A. Yes, sir.

Q. What is the reason for schedule 2921?

A. That is the filling out of the classification; where we have to use a schedule to cover the entire classification we insert this space where these items would be the statement 2921.

Q. Is it the practice to refer to the schedule by number, and was it the practice at that time?

A. Yes, sir; it was.

Q. And in item No. 7 on this exhibit there is a reference following the signature, "Walter Butler Company, C.P.F.F. Contractor with the U.S.A. and others as described in endorsement 3013, proposal dated May 18, 1942." What is the function of that reference? [233]

A. That is the signature of the various people involved as embodied in the policy.

Q. There isn't enough room to supply the data?

A. That is right, not in that schedule.

Q. Is there a space in this policy expressly provided, or specifically provided, for inserting the war projects rating plan endorsement?

A. No, nothing except as it applies covering the items I have covered in the schedules and endorsements.

Q. The Travers Company had written a number of compensation policies? A. Yes.

Q. What was the practice in respect to each of

(Testimony of George E. Peterson.)

these using these forms in inserting the number of the comprehensive plan endorsement?

A. There was no space provided. It cannot appear on the policy.

Q. Now, will you turn to any instrument in this exhibit which shows that the comprehensive rating plan was attached to and a part of the policy at the time it was issued?

A. Here is one right here (indicating).

Mr. Horowitz: Let us have it marked.

(Whereupon, document referred to was marked Defendants' Exhibit "A" in Defendants' Exhibit 8.) [234]

Q. I refer you now to the instrument marked for identification with the letter "A" in Defendants' Exhibit No. 8, the rider being marked 1721 according to the company's method. To what do you have reference?

A. It ties in here (indicating). Here it is, the entire paragraph 1-H-3016. This endorsement shows the schedule, tax multipliers for the state of Washington.

Q. What is the date of that?

A. Issued September 10, 1942, effective as of April 10.

Q. What was the date of the issue on the instrument? A. September 10, 1942.

Q. Is there anything else there that shows the endorsement was a part of the policy, that is, compensation policy?

(Testimony of George E. Peterson.)

A. Here is the comprehensive liability policy, one of the three, WSLG-863387. That policy shows that endorsement 3014 is a part of it. I think that is the corresponding endorsement.

Q. Turn now to 3014, and refer us therein to some statement which shows that the War Projects Rating Plan was a part of the compensation policy.

A. Paragraph 11 on page two of that endorsement, under the caption "Premium Adjustments," particularly for this policy, "The premium for this policy is to be computed in accordance with the provisions of the War Projects Insurance Rating Plan endorsement, forming a part of policy No. WUB-863386." [235]

Q. And is the date of the issue of that policy the same as the issue date of the compensation policy?

A. Both are issued on the same date, May 18th.

Q. Why is it, Mr. Peterson, the compensation policy has no specific reference to 3016, whereas in this policy there is specific reference? Now, look at the endorsement 3014.

A. There are two different parts of that endorsement. You will see under paragraph "C" at the bottom of the page, "Cancellation by the company shall not be effective unless a copy of the notice of cancellation is mailed to the Navy Department, office of Procurement and Material Insurance Division, Washington, D. C."

Mr. Whitla: Does it have a date of issue on it?

A. No, sir; it doesn't. That constitutes page

(Testimony of George E. Peterson.)

one of this endorsement 3014, and that was attached to the policy at the time it was issued. Subsequently, change was requested as the records changed cancellation provision was made as to give notice to the officer in charge of the construction here at the location of the work. You will notice in all other respects it conforms with the original issue which shows no date in the border, which is in accordance with the practice, and which is confirmed as a matter of fact by the provisions of this particular policy wherein all symbols, or symbol numbers [236] of the endorsement forming a part of the policy on its effective date shows the endorsement that 3014 was attached thereto.

Q. Now, my question, Mr. Peterson, why is it that under your practice at that time endorsement 3014 appears on this and does not appear on the form of the compensation policy?

A. The plain outlined here in regard to WSLG policy had not been extended to the compensation policy at that time.

Q. Now, with reference to the form used, was there anything in the nature of the forms that caused the insertion?

A. Yes; the form here is so spaced that this entry was provided for. The other did not.

Q. Was this a revised form?

A. Yes, sir; it was revision of practice.

Q. And the other was not? A. Yes, sir.

Q. Is that your explanation? A. Yes.

(Testimony of George E. Peterson.)

Q. Now, turn to the third policy, is there any reference in policy WSLA-863388 to the War Projects Rating Plan endorsement?

A. We have here the same situation as applies to policy WSLG. That was attached to this policy at the time it was issued—reference to the premium adjustment under the War Project Rating Plan, and specifically mentioning as being [237] added, and along with policy WUB-863386, being the compensation policy.

Q. Is the issue date of that policy the same as the issue date of the other two?

A. Yes, sir; it is exactly the same date.

Q. In addition to these pages to which you have testified as showing that the War Projects Rating Plan is a part of the compensation policy, what else do you base your testimony on that it was a part of that compensation policy? .

A. It starts in the very beginning, negotiations made with me personally. I went into the Navy Department and they would not have been interested in this unless it was on that basis, and after that deposit of premium was specified as being in connection with such contract, and advances made from time to time, which were made on that basis all the way through, and the binder itself is on that basis.

Q. What about the Home Office records?

A. That to me is absolute proof, so far as I am concerned, of the matter of practice.

Q. And what is your testimony to the Court as

(Testimony of George E. Peterson.)

to whether the War Project Rating Plan was a part of the compensation policy at the time of its issue—was it, or was it not?

Mr. Whitla: We object to that. He has given his reasons, and is now asked for an opinion. It is for your Honor to draw his conclusion from the testimony. [238]

The Court: I will permit him to answer.

A. My answer is positively that this was attached to the policy and formed a part of it, WUB-863386, at the time it was issued.

Mr. Horowitz: My attention has been called to the fact that there is another Exhibit marked with the letter "A." Plaintiff offered it in Defendants' Exhibit No. 8—he offered "A," "B" and "C." I wonder if we can agree that the letter "Z" can be substituted for the letter "A." I will ask the Clerk to strike a line through the letter "A."

The Court: Very well. The Clerk may make the change.

Mr. Horowitz: Now, the Clerk has drawn a line through the letter "A." It has a line marked through.

Q. (By Mr. Horowitz): There is some question that has arisen as to the function of this committee that you testified to. Will you please tell the Court the nature of the administrative problems considered by that committee?

Mr. Whitla: I object to it as wholly immaterial. What the committee did, that might be admissible, but the nature of the administrative problems as he sees them would not be admissible.

(Testimony of George E. Peterson.)

Mr. Horowitz: I think there was some inference cast by counsel on this committee, or the actions of the [239] committee—

The Court: Yes, I think counsel for the plaintiff did cast some inference or aspersion.

Q. (Mr. Horowitz, continuing): What was the nature of the problems considered by the committee?

A. Well, they dealt with the rules and regulations that developed as the plan became operative. We had risks in the manufacturing group that were engaged in some part of the operation, and some operations were on a fixed fee basis, and in some cases the situation was never divisible. The question was whether we could extend the plan to cover what we might call just normal work. Another had to do with a multiplicity of details which extended to the auditing of hundreds of classification, many of which had only small pay rolls, each rated separately. The question, can we get an average rate? And I could go on and tell you more and more, but that was typical of the work that this committee did.

Q. Did this committee make any recommendations as to the placing of insurance with any company?

A. No, sir; they could not, and would not.

Q. Did they recommend the placing of any insurance with the Travelers under the War Projects rating plan, or any other plan? A. Never did.

Q. Some reference was made by Mr. Whitla on cross-examination of what he characterized as a payment of five or six thousand dollar premium taxes

(Testimony of George E. Peterson.)
after the Travelers had made claim for a refund.
In the first place, what was the correct amount, Mr.
Peterson? A. Some twenty-eight hundred.

Q. In the second place, what, if anything, was received in connection with that payment after the claim for refund?

A. We were advised by counsel that we could not claim a refund in connection with the previous year's taxes. The taxes for one year having been paid, we could not take out of that tax anything that would indicate an overpayment on the subsequent year.

Q. You could not take credit in a subsequent year for payments in any previous year?

A. That is right.

Q. The overpayment to which claim for refund was made had reference to the overpayment on War Projects Rates Plan?

A. They were combined.

Q. The amount of twenty-eight hundred dollars was the amount paid for the period prior to 1945 and 1946?

A. For the year ending December 31st, 1944.

Mr. Horowitz: You may inquire.

Recross-Examination

By Mr. Whitla:

Q. Calling your attention to Exhibit No. 27 of the photostatic exhibit, I call your attention to a letter written February 28th, 1944, to the Directors of Insurance enclosing check for \$6,952.20 for taxes.

(Testimony of George E. Peterson.)

That was written by your company, and a check for that amount was enclosed on that date?

A. Yes, sir.

Q. And——

Mr. Horowitz: What did you say as to that amount, Mr. Whitla?

Mr. Whitla: It shows the enclosing of a check amount to \$6,952.20.

Mr. Horowitz: Just a minute. Mr. Peterson, what was the amount of the tax there?

A. \$208.57.

Mr. Horowitz: That is considerably different.

Mr. Whitla: I ask to have this sheet numbered four marked as Plaintiff's Exhibit No. 25.

(Whereupon, document referred to was marked Plaintiff's Exhibit 25, for purposes of identification.)

Mr. Whitla: And now, I will ask if the Travelers Insurance Company received that letter from the Department, or the Bureau of Insurance of the State of Idaho? [242]

Mr. Horowitz: That letter is dated April 10th, 1945.

A. Yes.

Q. That made a demand on you for \$3,178.23?

A. Yes, sir.

Q. I will ask you whether or not that was sent on March 15th covering premiums on that matter?

A. Yes, sir.

Q. That would be the workmen's compensation premium? A. And also the life premium.

(Testimony of George E. Peterson.)

Q. The life premium was \$29,970.21, and also the workmen's compensation premium, \$75,970.83, upon which taxes of three per cent was paid at that time?

A. That is right.

Mr. Whitla: I offer these in evidence.

The Court: Is there any objection?

Mr. Horowitz: No objection.

The Court: Admitted.

(Whereupon Plaintiff's Exhibit 25 for identification was admitted in evidence.)

Mr. Horowitz: You didn't refer to all of that as workmen's compensation claims?

Mr. Whitla: Yes.

Mr. Horowitz: Accidents, health, personal liability and workmen's compensation premiums, [243] \$75,970.73.

Q. (Mr. Whitla, Continuing): I now hand you Plaintiff's Exhibit No. 27, being sheet No. 7 of the photostatic exhibit, showing the payment to the Bureau of Insurance on premiums in the amount of \$75,970.83, in the sum of \$2,279.12, do you know if that is correct for the year ending December 31st, 1944?

(Whereupon Plaintiff's Exhibit No. 27, being the document referred to, was marked for identification.)

A. This is just a bill.

Q. A statement that you make to the Bureau of Insurance when you remit your taxes?

A. That is right.

(Testimony of George E. Peterson.)

Mr. Whitla: I now ask to have this instrument marked 7-A, and I offer No. 7 in evidence.

Mr. Horowitz: No objection.

The Court: Admitted.

Mr. Whitla: Now that this has been marked 7-A,—I should say 27-A. I will offer it.

(Whereupon Plaintiff's Exhibit 27, for identification, was admitted in evidence.)

Mr. Horowitz: No objection.

The Court: Admitted.

(Whereupon document referred to was marked Plaintiff's Exhibit 27-A, and admitted in evidence.) [244]

The Court: You had some agents that write insurance on a commission basis?

A. Yes, sir.

The Court: Where they are being paid a percentage on these commissions,—or the premiums, is the premium in its entirety as the amount on which the commission is paid, or is it after the tax is paid?

A. The tax is superimposed upon the premium before you apply the commission.

The Court: The agent would not have to take the net premiums after the taxes on the premium were paid as the basis to figure his commission?

A. He gets a commission as the premium is set up in the state for tax purposes.

The Court: Regardless of the taxes?

A. Yes, sir.

(Testimony of George E. Peterson.)

The Court: You don't deduct the taxes from the premiums or the amount of premiums on which you pay commissions?

A. No; he is usually paid on the gross premium, which includes the tax. He is paid the commission on the gross premium.

The Court: Just one more item: I think you have introduced checks here in which you tell me that \$340.00 was [245] paid to Mr. Ware during this time. Was that the full amount paid to Ware during this period, or was he paid some other commissions?

A. That was the total amount paid to Mr. Ware in connection with the premiums for this function, that is, for this countersigning.

The Court: Did you pay him any other money for the performance of any function?

A. If he produced any business directly.

The Court: Did he do that, or was he paid anything?

A. I think we have a record of a single instance.

The Court: But that is not included in this action at all?

A. No.

The Court: That is all I have to ask this witness at this time.

Q. (Mr. Whitla, Continuing): These checks introduced run up until the month in which these policies were issued for alleged performance before that date?

(Testimony of George E. Peterson.)

Mr. Horowitz: You say until the month in which they were issued?

Mr. Whitla: Until the month.

Mr. Horowitz: There is a check here in May.

Q. (Mr. Whitla, Continuing): Let me put it this way: [246] These checks begin on October 22nd, 1936, and run through until May 11th, 1942, and that is the only checks which cover that time, that it between those dates?

Mr. Horowitz: You are referring to the dates of the checks?

Mr. Whitla: Referring to the period. The dates are, the first beginning October, 1936, and the last being on May 11th, 1942.

A. I would say no to that question.

Q. Why?

A. It is my understanding that the date on the check does not correspond with the date of service.

Q. When was the service?

A. It began in October, and the check for October was for that month.

Q. Then you say the May check would be for the month of May? A. Yes.

Q. The policy was endorsed some time after the 11th of May, 1942?

A. I don't know quite what the check is. I will have to see when it was endorsed.

Q. I am saying that the policy was written on May 18th? A. Yes, sir. [247]

The Court: Were all of these policies written after the date of the last check?

(Testimony of George E. Peterson.)

A. Every one of them.

The Court: That is admitted, is it?

Mr. Horowitz: No; the witness has just testified, your Honor, that the check dated on May 11th, 1942, was for the entire month of May.

The Court: Wouldn't that be for the month preceding?

Mr. Horowitz: No.

The Court: You say that you pay in advance, do you?

Mr. Horowitz: We have a check there for every month.

Mr. Horowitz: This defendants' Exhibit No. 7 says: "Dear Mr. Ware: Yesterday Field Assistant Gilbert sent you new contract forms to sign in view of the fact that he inadvertently used the wrong form when he secured your signature during his personal visit to Coeur d'Alene last month.

"Following Mr. Gilbert's explanation of our proposed arrangement to reimburse an Idaho agency for handling a small amount of countersigning that will be necessary from time to time, I recommend to our Home Office that your [248] agency be recognized in this manner. I am now in receipt of advices that your agency has been approved for this service as of October 1st, 1936. On the basis of a monthly remuneration of \$5.00, payment for the month of October will be forwarded as of November 1st by the auditor, and a like amount each month thereafter until otherwise advised."

Mr. Horowitz: The first check is October 22nd,

(Testimony of George E. Peterson.)
and there is a check for every single month including a check for May.

The Court: That check was dated May 11th?

Mr. Horowitz: Yes.

Mr. Whitla: And it says here——

The Court: I think possibly you gentlemen should let the witness testify. You do have him on the stand, and what I am trying to get at is whether this money was in payment of any service in connection with the policies embraced in this action.

Mr. Whitla: This letter provides that you pay in November for October?

A. Yes.

Q. (Mr. Whitla, Continuing): The checks coming in was for the payment of the month back?

A. There wasn't any check for November 1st.

Q. The letter said that on November 1st the check would [249] be mailed for the October payment?

A. I would like to see the check. It is my understanding that the checks commencing with this one, October 22nd—these checks will show, I believe. I have reviewed all of that from month to month, and it was paid, because we have one for every month, including the month of May at the time this policy was issued in 1942.

The Court: Then under that program you paid in advance?

A. It is purely a matter of seeing the number of checks there, and the number of months that they were in payment of. It would prove the point.

(Testimony of George E. Peterson.)

The Court: I was simply trying to find out what Mr. Ware had been paid, if anything, in connection with these policies. He is being paid for work he did in connection with the countersigning of these policies, and now, if I have it right, Mr Ware has not been paid anything since immediately prior to the countersigning of the policies. He never received anything for countersigning these policies.

Mr. Horowitz: No, your Honor, that is definitely not so.

The Court: The checks were given before these policies were issued, and if all of them were given to him before these policies were issued, and no other amount was [250] paid to Mr. Ware, he hasn't received anything for countersigning these policies.

Mr. Horowitz: I think he has answered the question. However, I will ask this: Referring now to check dated May 11th, 1942, what period of time is covered? What does that cover?

A. The month of May, 1942.

Mr. Horowitz: Does it cover the services for countersigning the first three policies here?

Mr. Whitla: We object to that. It could not be for those services.

The Court: Certainly, Mr. Whitla, if you were entitled to recover, you would have to deduct any amount you had been paid.

Mr. Horowitz: These checks have been numbered from one to sixty-eight, and there are sixty-eight months, a five-dollar check per month, and there are sixty-eight checks.

(Testimony of George E. Peterson.)

The Court: The only service that Mr. Ware performed for these checks was waiving the statute, or the statutory requirement of paying your agent in Idaho, and he was paid that amount for being your agent in Idaho, whether he did anything for you or not?

A. He countersigned policies other than these.

The Court: He countersigned other policies?

A. Yes, sir; several policies.

The Court: He was paid five dollars per month. Was he paid anything additional for signing these policies?

A. No, sir.

Q. (Mr. Whitla, resuming): These exhibits that I have called your attention to show more than five thousand dollars paid to the state for taxation after you claimed the refund in 1943 or 1944?

Mr. Horowitz: My question was as to the payment for 1944.

Mr. Whitla: The payment in 1945 is for 1944.

Mr. Horowitz: I understand.

Mr. Whitla: There were over three thousand—

Mr. Horowitz (Interposing): That is what he testified to, the amount of \$2279.12 tax for the accident department.

Mr. Whitla: If it shows for 1945,—no, for 1944, a payment of \$3,178.23, doesn't it?

A. May I make an observation?

Q. (Mr. Whitla, continuing): Whether you made payment of that tax at that time, or not, you can answer?

(Testimony of George E. Peterson.)

A. This is a request for the payment of the taxes.

Q. Now, follow that up, in Exhibit No. 26 you made remittance for that? [252]

(Whereupon document referred to was marked Plaintiff's Exhibit 26 for purposes of identification.)

A. Yes, we did.

Q. Now then, Mr. Peterson, endorsement which has the company number 3015 on the policy WSLA-863388 contains two pages, does it not?

A. Yes, sir; in fact there are three pages.

Q. The first is complete in itself with the signature of the secretary of the Liability & Compensation Department and the General Secretary?

A. That is right.

Q. That is the first endorsement and shows the date of issue? A. Yes, sir.

Q. And what is that?

A. June 29, 1942.

Q. It was put in June 29th, 1942?

A. That part of the endorsement was.

Q. And the next endorsement, is that a continuation of the same endorsement?

A. That is the original endorsement.

Q. Why do you say that?

A. It bears no notation. It was issued at the time the policy was issued. [253]

Q. That is the only reason?

A. No; it is not. It is shown in there.

Q. It is shown in the policy itself?

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. You say it is the second page, rather than the first two pages, that show that?

A. It was revised for the reason that I have mentioned.

Q. The revision of the second page, is that it?

A. There is a revision,—originally it called for the notice of cancellation by the company, and subsequently it became necessary to extend that to the contracting officers, which was not called for in the original endorsement.

Q. It has some other matters, that is, endorsement 3015 on there, doesn't it? A. Yes, sir.

Q. That is the only reason you have to give for this War Projects rating being attached to that policy at that time?

Mr. Horowitz: Which policy now are you talking about, Mr. Whitla?

Mr. Whitla: The only one we are talking about.

Q. Is that the WSLA policy?

A. This endorsement is on the policy. It appears that it was on the face of the policy. It indicates the symbol number of the endorsement forming a part of the policy on [254] its effective date.

Q. All that said is that under the provision of the War Projects Rating endorsement formed a part of policy WUB-863386?

A. That is a part of the same endorsement which was issued. This is page one, continued on page two. Page two was subsequently changed. That constitutes the endorsement attached to the policy when

(Testimony of George E. Peterson.)
issued. Page two was changed to make the extension of the cancellation provision.

Q. On these policies you had room to put the endorsement on, and you didn't have on the other?

A. It was a matter of change in procedure.

Q. Why was it that on the main policy you weren't able to put the endorsement in the policy?

A. They were in the policy.

Q. The endorsement is not specified in the policy?

A. It was not the practice of the company to do that.

Q. Why was it the practice to put in a part and not the balance?

A. No part except as they appeared as necessary.

Q. The rule was that you didn't put in the policy, the contract itself, any endorsements that you were attaching to it?

A. We put the endorsements in that constituted a part [255] of it. I have shown that they were attached.

Q. Did you put anything in this policy as to the endorsement you referred to as the War Project Rating 3016? If it is in that policy tell us where it is, the number, reference, or any reference in the contract part of that policy?

A. I have outlined that the practice of the company was—

Mr. Whitla: If the Court please, I have asked

(Testimony of George E. Peterson.)

him a fair, direct question. I don't think it is necessary to give any explanation.

The Court: You may answer, if you are able to. If you cannot answer, just say so.

Q. I asked you if you could *find in* the contract portion of the policy itself?

A. No; it is not in the contract portion.

The Court: We will recess at this time for ten minutes.

May 1st, 1947, 3:10 P.M.

Mr. Whitla: Exhibit marked Exhibit No. 26 was not admitted. I ask that it be admitted at this time.

Mr. Horowitz: We have no objection.

The Court: It may be admitted. [256]

(Whereupon Plaintiff's Exhibit 26 for identification, was admitted in evidence.)

Q. (Mr. Whitla, continuing): You stated that there was a difference in the figures between Exhibit No. 4 and Exhibit No. 9. Is there any other difference than the time on the payroll and the amount of figured compensation?

A. I would not be able to answer that without checking item for item.

Q. Will you point out the difference?

A. This covers a longer period of time.

Q. Besides that, you stated there was a difference in the figures?

A. I cannot tell that definitely item by item.

Q. You don't know whether there is a difference? A. There may be different periods.

(Testimony of George E. Peterson.)

Q. That is admitted.

A. Well, that would be different.

Q. The amount of time worked and the amount of compensation?

A. This last covers more time.

Q. Aside from that you know of no difference?

A. That is right.

Q. I think you said something about taking from Best a list of casualty companies that paid no commission. Have [257] you that with you?

A. I had the Spectator chart.

Q. Did you count up to see how many paid commissions and what they did pay as shown there?

A. I did not.

Q. There is something like a hundred mutual companies that pay commissions?

A. I don't know.

Q. Turn to the Alleghany Mutual Casualty Company, and look at that and see if they pay commissions,—just look over that list and compare them and see if they are mutual companies and whether agent's commission.

The Court: If you think this is important, I suggest that you go ahead with something else and let him check it during the recess of the Court.

Mr. Whitla: That is agreeable. I think that is all I have of this witness.

Redirect Examination

By Mr. Horowitz:

Mr. Horowitz: This witness testified on my direct examination that instead of five thousand dol-

(Testimony of George E. Peterson.)

lar casualty premium being involved there was about twenty-eight hundred in 1944. Now, I will offer this whole exhibit. It is Defendant's Exhibit No. 28. [258]

(Whereupon documents referred to were marked Defendants' Exhibit 28 for purposes of identification.)

Mr. Horowitz: At this time I offer that exhibit, the photostatic pages of one to twenty-two, except for the sheets numbered four, five, seven and eight. I understand those have been offered in evidence by the plaintiff. Now I offer the balance of the sheets, containing, as they do, the entire taxes for the period ending December 31st, 1944, being a part of the copy furnished to counsel on his motion for inspection of the records.

Mr. Whitla: I have no objection.

The Court: It may be admitted.

(Whereupon Defendants' Exhibit 28, for identification, was admitted in evidence.)

Q. Handing you Defendants' Exhibit No. 28, I direct your attention to sheet No. 4 which has been admitted in evidence as Plaintiff's Exhibit No. 25, showing a total of \$3,178.23. I call attention to a letter, being Defendants' Exhibit No. 26,—rather, Plaintiff's Exhibit No. 26, and call your attention to the amount, \$3,178.23, which is shown in the letter of April 10th, 1945? A. Yes, sir.

Q. Now, in the first place, has there been included in that figure of \$3,178.23 anything for life insurance premium taxes? [259]

(Testimony of George E. Peterson.)

A. Yes, sir.

Q. What is that amount? A. \$899.11.

Q. And what was the total of the accident premium tax? A. \$2,279.12.

Q. And is that figure, \$2,279.12 included in the \$3,178.23?

A. Yes, sir; according to that, it is.

Q. I call your attention now to Exhibit No. 27—Plaintiff's Exhibit No. 27, I call your attention to the tax in the amount of \$2,279.12, is that the same figure referred to in the preceding letters, Plaintiff's Exhibits 25 and 26? A. Yes, sir.

Q. Exhibit No. 27-A, which is dated March 15th, 1945, returning tax by way of a check for \$138.37?

A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Sheet No. 10 of the same exhibit, a return to the Tax Department, what is that tax?

A. \$138.37.

Q. Is that the same item I just asked about?

A. Yes, sir. [260]

Q. And sheet No. 11, a return to the Industrial Accident Board of the State of Idaho, that shows a tax in what amount? A. \$491.00.

Q. Calling your attention to sheet number twelve, the letter dated February 7th, 1945, that is a letter in reference to that tax,—what tax is referred to there? A. \$491.00.

Q. Is that the same \$491.00 to which you testified? A. Yes, sir.

(Testimony of George E. Peterson.)

Q. Turn to sheet No. 13, a notice of tax return, in what amount is that? A. \$491.00.

Q. Is that the same amount you testified to?

A. The same amount.

Q. Sheet number fifteen, which is a return by the Travelers Indemnity Company, what amount of tax is shown there? A. None.

Q. Sheet number seventeen of the same exhibit, dated August 7th, 1944, what is the amount of tax shown to be due the Industrial Accident Board?

A. \$12.24.

Q. Sheet No. 18, dated July 3, 1944,—I guess that is July 31st, 1944, what is the tax referred to there? [261] A. \$12.24.

Q. Is that the same item in that report which you testified to? A. Yes, sir.

Q. And sheet number nineteen, which is the return itself, in what amount is that tax shown?

A. \$12.24.

Q. And is that the same item that appears on the other sheets that you just testified to?

A. Yes, sir.

Q. And calling your attention to sheet number twenty-one of the same exhibit, the return of the Industrial Accident Board, what amount of tax is shown there? A. None.

Q. So that in this entire folder, after taking all the exhibits plaintiff has offered in evidence, what is the amount of tax for the period ending December 31st, 1944, for the accident or casualty department?

(Testimony of George E. Peterson.)

A. \$2,279.12, \$138.37; \$491.00 and \$12.24.

Q. Will you please total those amounts?

A. \$2,920.73.

Q. Now then, have you excluded the tax return for the indemnity company as distinguished from the insurance company? A. No. [262]

Q. And that is a tax of what amount?

A. \$138.37.

Q. Deduct that from the total there.

A. Yes, sir.

Q. And what do you have? A. \$2,782.36.

Q. Is that figure the twenty-eight hundred dollars that you referred to in my direct examination?

A. I believe I referred to it as twenty-eight hundred dollars.

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

(Witness excused.)

G. M. JORDAN

a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Horowitz:

Q. Where do you reside, Mr. Jordan?

A. Spokane, Washington.

Q. What is your age? A. Thirty-six.

Q. How long have you resided in Spokane?

A. About eight years. [263]

(Testimony of G. M. Jordan.)

Q. Are you connected with the Travelers companies?

A. I am employed,—an employee of the Claims Department.

Q. The Casualty Department?

A. The entire organization. It includes the casualty.

Q. You are stationed where?

A. Spokane.

Q. Were you an employee of the Travelers Companies during the construction of the Naval Station at Farragut? A. Yes, sir.

Q. What was the nature of that work?

A. I was serving the insurance claims and also supervising some people we had working on the project.

Q. Where were you stationed at that time?

A. My office was at Spokane, but certain work was at the project. We had an office at the project, too.

Q. Was the servicing of the claims,—were they claims arising under these policies we are discussing here? A. Yes, sir; that is right.

Q. Who did you have assisting you in those claims?

A. We had two men, Paul Shedler and George Sonickson, and the clerical staff that was necessary.

Q. What were the functions of these men?

A. Each of these men were resident investigators at [264] the project itself. They lived at the project, or nearby. The purpose of their work was

(Testimony of G. M. Jordan.)

to investigate claims that did arise following injuries on the job, or to assist workmen in preparing reports and forms required by the Industrial Accident Board, and to cooperate with the hospital on the job that was maintained by the contractor and the insurance company, and to obtain medical reports, and to assist in arranging for medical care for men outside of the job. Some injuries were so severe that they had to have care either in Coeur d'Alene or Spokane; and also in preparing papers for the workmen's compensation claims.

Q. What period of time was covered by the service you were rendering with the assistance of these men?

A. My first knowledge of this project was received on April 30th, 1942. That was the first day that I knew of this. My original instructions came on that day, and we are still serving it today.

Q. During the time April 30th, 1942, when you and your associates were engaged in servicing claims, did Mr. Ware assist you in any way?

A. No, sir.

Q. Did he have any functions in connection with your servicing?

A. Not to my knowledge. [265]

Q. In the event that a claim occurred that required attention, or the handling of it by yourself and associates, who would carry the servicing from there on out?

A. I can answer that by explaining it. At one time there was better than twenty-five thousand

(Testimony of G. M. Jordan.)

coming from all over the United States, and they started to dissipate all over the United States because of injury, and it was necessary to service their claims, and we referred the claim to the nearest office to their home. We just followed the men.

Q. And if the men lived in the vicinity of the work?

Mr. Whitla: We object to that, as it is immaterial.

The Court: I don't know that it can be harmful to you. He may answer.

A. If I understand the question, if the men lived in this vicinity and went to other states the matter would be referred to other states.

Q. Would you like to give a specific example to Clarify it?

The Court: I think the matter is very clear to the Court.

Q. Who would look after the claims if they reached the state of contest?

A. By that you mean if there was a hearing before the Industrial Accident Board?

Q. Yes. [266]

A. The firm of Whitla & Knudsen.

Q. And they represented whom?

A. The Travelers Insurance Company.

Q. Was Mr. Ware asked to do anything with them? A. I don't understand.

Q. Did Mr. Ware have anything to do with looking after these contests handled by the attorneys?

(Testimony of G. M. Jordan.)

A. I don't know.

Q. Did you have anything to do with asking Mr. Ware for any service in connection with handling of local claims? A. I never knew Mr. Ware.

Q. Do you know about how many cases you had to send out,— we will say, country-wide?

A. I would say a hundred.

Q. And in what area, generally?

A. All over the United States. I know there was one in Florida, there was some in the Dakotas, some in California, some in the east.

Q. Did Mr. Ware have anything to do with servicing these claims? A. No, sir; he did not.

Q. In connection with handling the claims on the job, did you have contact with the representative,—with the insurance adviser, or representative, or his representative? [267] A. Yes, sir.

Q. Who was he?

A. Mr. G. T. Norton.

Q. He was regularly employed by the Butler Company?

A. You mean who employed the insurance adviser? When he was first seen by me I asked what his title was and he explained that he was—

Mr. Whitla (Interposing): Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Horowitz: That is all.

Cross-Examination

By Mr. Whitla:

Q. You never saw Mr. Ware?

A. No, sir.

(Testimony of G. M. Jordan.)

Q. He never refused anything that he was requested? A. No, sir; I never saw him.

Q. You,—we were employed in three very small contested matters, and they were settled by the decision here in Coeur d'Alene?

A. You were representing them in three cases that were contested. They were normal cases, usual cases, before the Board.

Q. To show the extent of them, the fee we charged was [268] twenty-five dollars,—or fifty dollars for the three? A. I don't remember that.

Q. We furnished you with the bills?

A. Yes, sir.

Q. And that was about the sum of our employment? A. Yes, sir; I think so.

Q. You in cooperation with Butler Construction Company kept a hospital on the ground?

A. Yes, sir.

Q. And you kept Mr. Sonickson and Mr. Sheddler, that is, they stayed on the ground all of the time?

A. These employees maintained an office.

Q. You kept a clerical force on the ground?

A. Our clerical force that handled the major affairs was in the claims office in Spokane. However, we had one at the process office that was furnished there.

Q. And you, in connection with the Butler Construction Company, hired a couple of doctors?

A. Three of them.

(Testimony of G. M. Jordan.)

Q. That was a joint operation between you and the Butler Construction Company?

A. Yes, sir.

Mr. Horowitz: I offer Defendants' Exhibit No. 29 in evidence, which is a certificate of the Director of Insurance. [269]

(Whereupon document referred to was marked Defendant's exhibit 29 for purposes of identification.)

The Court: Is there any objection to this?

Mr. Whitla: No, we admit that they were authorized to do business in Idaho.

The Court: It may be admitted.

(Whereupon Defendant's exhibit 29 for identification, was admitted in evidence.)

Mr. Whitla: That is all.

Mr. Horowitz: At this time I offer a certified copy of articles of incorporation of the Idaho Compensation Company certified to by the Secretary of State, being Exhibit No. 30. The purpose of this is on the Constitutional question. We want to show that there is discrimination against a foreign company. We want to show that there is a corporation in Idaho doing this business.

(Whereupon Defendant's exhibit 30, being document referred to, was marked for identification.)

Mr. Whitla: We object to it as incompetent, irrelevant and immaterial.

The Court: The Ninth Circuit Court of Ap-

peals reversed the decision of this Court on that matter. I was of the opinion that this was repugnant to the Constitution on two grounds, but the higher Court felt that I was in error in so holding, and there was no further appeal from that Court on that question, and of course that is the law now, so far as this Court is concerned. I don't feel I have any right to pass on it. If I were to re-express my opinion, as I did before, in contradiction to the higher Court, this Court would be subjected to severe criticism. However, I will admit this into the record subject to a motion to strike. However, I would still leave the exhibit in the record, but would grant the motion to strike.

Mr. Horowitz: I do not want to do anything in the trial of this case that will try the patience of your Honor, as I think your Honor has observed from my demeanor here, but we still think this question is in the case. Your Honor may feel presently that you are foreclosed from doing anything about it, but we are going to take this position in dealing with this constitutional question. We believe that the case was sent back to determine the local law. When the Circuit Court passed upon this case it passed on it without regard to what the local law meant. If it is sent back to determine what the law is before the constitutional question is decided, then we would like an opportunity to argue that question. I don't think the Circuit Court of Appeals passed upon the constitutional question, or they passed on it before being advised what the law is, that is the local law. I would like an opportu-

nity to present this matter as to the meaning of the local law. [271]

The Court: I am sure that the Circuit Court has said that the statute was clearly within the power of the state to adopt, and I will follow the same procedure. However, I will admit this, and if counsel will make a motion to strike, I will take the motion under advisement.

(Whereupon Defendant's Exhibit 30 for identification was admitted in evidence.)

Mr. Whitla: At this time, having admitted Defendants' Exhibit No. 30, the Articles of Incorporation of the Idaho Compensation Company, comes now the plaintiff and moves that the said exhibit No. 30 be stricken from the record as being incompetent, irrelevant and immaterial for any purpose whatever, particularly for the reason that this matter was heretofore appealed to the Circuit Court, and they ruled directly upon the constitutionality of the statute and that has become the law of the case under which all further proceedings in this case shall be heard and determined.

The Court: I agree with you at this time, but I will take the motion under advisement at the request of counsel for the defendants.

Mr. Horowitz: That is all. I wonder if your Honor intended to recess shortly?

Mr. Whitla: We have one witness here that is hard for us to hold any longer, and I am sure it will take [272] a very short time. If it is agreeable, I will call her?

Mr. Horowitz: That is agreeable with us.

EVELYN THOMAS MICHAELSON

called as a witness for the plaintiff in rebuttal, having been first duly sworn, testified as follows:

Rebuttal
(Direct)

By Mr. Whitla:

Q. Where do you reside? A. Spokane.

Q. What connection did you have with Eugene H. Ware? A. I was employed by him.

Q. How long?

A. From December 28th, 1938?

Q. Until when—you are the Miss Thomas that signed the letters for E. H. Ware Company in evidence here as Defendants' Exhibits 20 and 21, are you? A. Yes, sir.

Q. Now, you are familiar with the fact that the policies—of the policies coming to the office of Mr. E. H. Ware to be countersigned? A. Yes, sir.

Q. Who got them from the mail?

A. I opened the mail.

Q. Did you read the main policies at the time, or before it [273] was countersigned by Mr. Ware?

A. Yes; I did.

Q. I hand you now this policy marked Plaintiff's Exhibit 1, and I will ask you if at the time this policy came in you read it for the purpose of seeing what endorsements were attached to it at that time? A. Yes, sir.

Q. Do you remember the endorsements as they were specified in the top of the policy?

A. Yes.

(Testimony of Evelyn Thomas Michaelson.)

Q. Were there others than those specified on the face of the policy? A. No; there were not.

Q. When did you hear of the proposition of the War Projects Rating Plan?

A. After the case was started, we received a letter from the company calling attention to the fact that—

Q. (Interposing): The question was, when did you hear of the proposition? That was through a letter from the company? A. Yes, sir.

Q. Calling your attention to the War Projects Rating endorsement 3016, was that matter on the policy at the time it was submitted to Mr. Ware for countersigning? A. No, sir. [274]

Q. Accompanying these policies was there any bond? A. A bond prior to the policies.

Q. What did you do with the bond?

A. It was signed by Mr. Ware and forwarded to the company.

Q. What was done with the policies immediately after they were signed?

A. Forwarded to the company.

Q. Was an envelope supplied for sending them to the company? A. Yes, sir.

Mr. Whitla: That is all.

Cross-Examination

By Mr. Horowitz:

Q. Can you remember from memory what endorsements were on the policies, what were the names of the endorsements on the policies?

A. I don't recall the names of them.

(Testimony of Evelyn Thomas Michaelson.)

Q. What was the subject matter of any of the endorsements on the policies?

A. I cannot recall.

Q. It is pretty hard to remember documents that you looked at a number of years ago as to the endorsements that came on policies, isn't it?

A. I looked over the policy with the idea that we were out [275] trying to solicit business.

Mr. Horowitz: I move that be stricken as not responsive. My question is:

Q. Did you remember? Now, you don't claim that you remember the nature of the endorsements that were attached to this policy?

A. That one particular endorsement I recall because it was something new.

Q. What endorsement?

A. The War Rating endorsement. I never heard of it.

Q. You noticed it at that time?

A. Yes, sir.

Mr. Horowitz: That is all.

Redirect Examination

By Mr. Whitla:

Q. Did you check the policy to see what it covered? A. Yes.

Q. Why?

A. Because Mr. Ware was going out to the base to contact someone in regard to compensation insurance.

Q. Had he done that prior to the time the policy came in? A. Yes, sir.

(Testimony of Evelyn Thomas Michaelson.)

Q. Then because of the fact that he attempted to solicit [276] business——

Mr. Horowitz: There is no claim for services. There is no claim in any of the pleadings. Surely at this time we are not going to change the theory of this case. I submit that it is incompetent, irrelevant and immaterial, and it is improper rebuttal.

The Court: Under the statute, there are two provisions: One is the provision that where an agent gets the insurance he is entitled to the full commission; another is that provision where the insurance is obtained by a license broker, that he shall receive five per cent. Now, either of these provisions may apply here, if the Court was to hold that there was sufficient evidence.

Mr. Horowitz: At the time this policy was written, your Honor, there was no provision for a broker to be licensed under the laws of the State of Idaho. In 1943 a statute was passed which created the licensed brokerage law, but there was no provision under the Idaho law other than fire insurance brokers.

Q. (Mr. Whitla, continuing): What was the reason you had for checking the policy?

A. For the purpose of soliciting business. Mr. Ware had gone out to solicit business, but he was unable to contact the person in charge. [277]

Q. Then after that what did you do with reference to checking this policy when it came in?

Mr. Horowitz: That has been answered.

The Court: She may answer again.

(Testimony of Evelyn Thomas Michaelson.)

Q. Did I understand that the War Projects Rating endorsement was on it?

A. It was not on it.

Mr. Whitla: That is all.

Recross-Examination

By Mr. Horowitz:

Q. You, as I understand it, were working for Mr. Ware for a number of years, from 1938 on?

A. For five and a half years.

Q. What did you do the day before this policy came in?

Mr. Whitla: Now, we object to this as incompetent, irrelevant and immaterial.

The Court: Sustained. That is impossible to be answered.

Mr. Horowitz: That is exactly the point. It bears on the question of credibility.

The Court: I don't think that is a good question, even as to the credibility. The objection is sustained.

Q. (Mr. Horowitz, continuing): By the way, do you recall whether there was an Idaho statutory endorsement on the policy [278] at the time you inspected it? A. I don't recall.

Q. Do you recall whether there was a provision in the policy calling for the Idaho statutory endorsement? A. No, I don't.

Q. Do you know what the Idaho statutory endorsement is? A. No, not now, I don't.

Q. Do you now recall any particular endorsement on the policy?

(Testimony of Evelyn Thomas Michaelson.)

A. No, but there would be the one on occupational diseases.

Q. Do you think of any others?

A. There were some others attached, but I don't know what they were.

Q. When this was countersigned there were various endorsements attached, and you cannot recall what these were? A. Yes, sir.

The Court: Can you tell by looking at the policy? A. Yes, I think so.

Redirect Examination

By Mr. Whitla:

Q. I think you took the number of the policy and checked to see if that number was there?

A. Yes, sir; that is right. [279]

Mr. Whitla: That is all.

Mr. Horowitz: That is all.

The Court: We will recess at this time until ten o'clock tomorrow morning.

May 2nd, 1947, 10:00 A. M.

GEORGE E. PETERSON

a witness on behalf of Defendants, recalled for further cross-examination, having been previously sworn, testified as follows:

Further Cross-Examination

By Mr. Whitla:

Q. Mr. Peterson, taking up some of these companies referred to by you, the Lumbermen's Mutual

(Testimony of George E. Peterson.)

Casualty Insurance Company, that company writes through both agencies and by direct writing, does it not?

Mr. Hawkins: For the purpose of the record, I would like to say that we didn't have access to Best's Guide, and we tried to get the information from the book we had. I hope that you can shorten this up. It seems to me it is very immaterial.

Mr. Whitla: I think we can.

A. It appears from this record that they do write some [280] directly, and pay some commissions, a very small rate of commission shown overall in connection with the Lumbermen's Mutual.

The Court: What is that commission?

A. 2.7 per cent.

Q. (Mr. Whitla, continuing) Best shows here both agency and direct writing are involved and used by that company?

A. It shows a commission of 2.7 per cent, \$7,020.00.

Q. That would indicate that a good part of the business is done direct?

A. A very substantial part.

Q. I believe you mentioned the American Liability Company. That writes on a commission basis, entirely, does it not?

A. What was that question?

Q. The American Liability—the American Mutual Liability writes on a commission basis?

A. It does not.

Q. I call your attention to Best at page 450

(Testimony of George E. Peterson.)

showing this: In writing this insurance, commissions of \$274,986.00 or eight per cent?

Mr. Horowitz: That is not eight per cent. That is eight-tenths of one per cent.

A. Eight-tenths of one per cent. I concluded that the [281] major portion of the business was not on a commission basis.

Q. And the Employers Mutual Casualty, what business—or, rather, what basis does that company write its business on?

A. Is that the Mutual Liability Insurance?

Q. There are two of these Employers Mutual. There is the Employers Mutual of Warsaw.

A. That is the large company.

Q. That writes both ways?

Mr. Horowitz: What company are you talking about now?

Q. The Mutual Company of Warsaw—the Employers Mutual of Warsaw.

A. They apparently write some business on a commission basis but the bulk of the business must be on direct solicitation, because the commission of one and seven-tenths per cent of the total writings, which are some twenty-nine million.

Q. You spoke of the Lumbermen's Mutual Casualty Company, one of the companies that was on the committee with you?

Mr. Horowitz: Isn't that the Liberty Company?

Mr. Whitla: I asked for the Lumbermen's.

A. The Lumbermen's Mutual of Chicago?

Q. No, I believe you gave the Lumbermen's Mutual Casualty [282] Company of New York.

(Testimony of George E. Peterson.)

A. They write, apparently, on both phases, writing the bulk of the business direct since the premium—and by the way that is the Lumber Mutual Casualty Company of New York. The premiums are two million five hundred and ninety-six thousand, and the commission amounts to only 2.7 per cent.

Q. Now, I believe you also mentioned the Employers Mutual Casualty?

A. That is the Warsaw Company?

Q. No.

A. That is from Des Moines, Iowa.

Q. Yes; I think it is.

A. They apparently write the bulk of their business, if not all of it, on a commission basis.

Q. The commission rate is 18.9 per cent?

A. That is correct, but it is a relatively small company, writing six million total premium annually.

Q. These companies that write on another basis keep salaried agents instead of commission agents?

A. I never heard them referred to as that; they are called salaried employees.

Q. I believe you spoke of the Hardware Mutual Casualty Company? A. Yes. [283]

Q. I call your attention to Best's at page 530, the Hardware Mutual Casualty Company also has a large force of employees whom they call safety engineers and claim representatives?

A. Yes, sir; it indicates that they have some six hundred people engaged in so-called servicing and

(Testimony of George E. Peterson.)
solicitation. In my book it shows they pay no commission whatever.

Q. Do you know whether these companies have agents in Idaho? A. I would not know that.

Q. Do you know whether—strike that, please.

A. (Interposing): I do know that the Employers Mutual of Des Moines wrote nine thousand dollars of business in Idaho out of \$6,647,000.00 in premiums.

Q. The Hardware Mutual Company has agents in Idaho? A. I don't know about that.

Mr. Whitla: That is all.

Redirect Examination

By Mr. Horowitz:

Q. That list that counsel gave you, did it include the Liberty Mutual?

Mr. Whitla: The Liberty Mutual is shown in Best's as being large and paying heavy salaries, does it not?

A. I don't know what salaries they pay. [284]

Mr. Whitla: Doesn't it show in Best's as to what kind of salaries they have for the Home Office?

A. You have Best's. I didn't have it. I cannot tell you.

Mr. Whitla: Calling attention to Best's, on page 570 under their "Underwriting Expenses," "Br. Office," means branch office? A. Yes.

Mr. Whitla: And branch office and agents salaries, \$3,863,221.00, or five and one-half per cent?

Mr. Horowitz: That is five and one-tenth per cent.

(Testimony of George E. Peterson.)

A. In the Spectator chart there is no agent commission recognized.

Mr. Whitla: What about the agent's salaries?

A. I think it should be like the others.

Mr. Whitla: They pay inspectors, too, do they not? A. Yes.

Mr. Horowitz: And what percentage does that show? A. One and seven-tenths.

Mr. Whitla: Does it indicate they have agents working on salaries that do this work amounting to a considerable sum of money? [285]

A. They have salaried employees, according to the Spectator chart, but there are no commissions.

Mr. Whitla: Those that do not have commissions have salaried agents? A. Yes, sir.

Redirect Examination

By Mr. Horowitz:

Q. The commission companies have salaried employees, engineering service? A. Yes, sir.

Q. Is engineering service comparable to paying persons for producing business? Is it comparable to commissions?

A. I don't see the relationship, personally.

Q. According to the information you have from Best, or the Spectator, they are both well recognized? A. We use it.

Q. According to the Spectator does the Liberty pay any commission?

A. No, sir; they do not.

Q. How much premium income does the Liberty Mutual have?

(Testimony of George E. Peterson.)

A. It is the largest casualty company in the United States, if not in the world, that is, the largest Mutual casualty. It has a total premium of \$75,888,423.00.

Q. What is the area of operation? [286]

A. On a national basis.

Q. Did the Liberty Mutual write any business in Idaho, according to the Spectator?

A. They had \$2,000.00 in business in Idaho in 1945, according to the Spectator.

Q. When you took Mr. Whitla's list, how many companies did he have on that list?

A. One hundred and one.

Q. How many were you able to find in the Spectator?

A. I have the totals on sixty-eight of them.

Q. Included in that list were there any companies who write other than casualty business?

A. Yes sir; quite a few. I should judge by their names some of them were not in the casualty business at all.

Q. Will you give us one illustration?

A. Well, the largest mutual life insurance company in the world, the Metropolitan Life.

Q. Excluding life insurance companies, and confining it to the sixty-eight companies that he gave you, what was the average rate of commission?

A. The average was seven and five-tenths of the sixty-eight companies, and I made a further calculation and took out two companies not in the cas-

(Testimony of George E. Peterson.)

uality field, and I reduced that seven and five-tenths per cents to seven and one-tenth [287] average.

Q. According to the information in the Spectator chart dealing with the one hundred companies involving a total premium of \$385,544,170.00, what was the average rate of commission?

A. The average rate for the hundred was 6.9 per cent.

Q. Did you make any calculation to determine whether the mutual companies wrote any business on a non-commission basis?

A. They must, in order to show that average, over all.

Q. How does that average compare with the stock company commissions during the same period of time?

A. The Spectator chart has a list of one hundred and ninety stock companies with premiums of \$1,194,108,319.00 against which is shown an average commission payable, and paid, of 18.1 per cent.

Q. Will you please tell the Court whether the companies embraced in the one hundred mutual and one hundred ninety stock companies refer to the entire United States? A. Yes, sir.

Q. Will you tell us if the Spectator that you used show the amount of compensation business written by the Idaho Compensation Company in the state of Idaho for any of the years that you checked?

A. I cannot find it in that book, but I found it in an edition of Best that I have, with the key rating, and it shows some of the totals. The total

(Testimony of George E. Peterson.)
premiums of the company,—and I found the Idaho Compensation.

Q. What did you find?

A. In 1942, 1943, 1944 and 1945.

Q. What is the total premiums listed under the premiums written?

A. \$724,000 in 1945; net premiums around \$750,00 in that year.

Q. Does that show, or do you have the data there, so that you can determine how much of the compensation business written by the Idaho Compensation is as compared with the total written in this state?

A. Yes, sir; we do have some information.

Mr. Whitla: This goes under my same objection.

The Court: That is understood.

A. The Idaho Compensation writes about ten times as much as any other single company doing business in Idaho.

Mr. Horowitz: That is all.

Recross Examination

By Mr. Whitla:

Q. Do you notice the commission it pays?

A. It doesn't show it in this little book.

Q. It is just a new company that started a few years ago [289] and went up in about seven years from nothing to \$700,000 in 1945?

A. Yes, sir.

The Court: And there is no showing of the commission paid by them? A. No.

Mr. Whitla: I have a witness here to show that.

(Testimony of George E. Peterson.)

Mr. Horowitz: That is all.

Mr. Whitla: That is all.

Mr. Horowitz: So that the record may be clear that all of the exhibits we have offered have been admitted, I want to reoffer Defendants' Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23-A, 24, and the Letter "C" if that was the letter given it by the Clerk of Defendants' Exhibit No. 8, Defendants' Exhibits 28, 29 and 30, and if I have omitted any, I would like to include them in this offer, any that were identified.

The Clerk: Was Defendants' Exhibit 17 offered?

Mr. Horowitz: It was offered.

The Court: They may be admitted subject to the objections.

Mr. Horowitz: Do I understand they may be admitted over counsel's objection?

The Court: They may be admitted subject to any [290] objection heretofore made; at the time they were offered any objection made then is still in the record.

Mr. Horowitz: Very well. And we rest.

J. G. ADAMS

a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Whitla:

Q. Where do you reside?

A. Coeur d'Alene, Idaho.

(Testimony of J. G. Adams.)

Q. How long have you resided here?

A. Three years.

Q. What is your occupation, Mr. Adams?

A. Insurance and real estate.

Q. How long have you been in the insurance business? A. For thirty years.

Q. In what capacity have you acted?

A. As local agent, in the company's Home Office, and employed as branch manager.

Q. Of what companies?

A. General Insurance of America, General Casualty of America and the First National Insurance Company of America.

Q. What branch office were you manager of?

A. Boise, and Spokane.

Q. Have you been engaged, since you have been in [291] Coeur d'Alene, in running a general Insurance Agency? A. Yes, sir.

Q. Did you—strike that—during your time as an Insurance man are you familiar with a concern known as the Hardware Mutual Casualty Company?

A. Yes, sir.

Q. Did you know anything about their agency arrangement or how they handled their agency?

A. I was Branch Manager of the Spokane Office of the General Casualty Company, I had occasion to hire employees for our office that had previously been—

Mr. Horowitz: I don't think that is responsive.

Q. If you know about the arrangement.

A. Their agents are employees of the Company,

(Testimony of J. G. Adams.)

they work on a commission—a combined commission and salary basis; they pay their own expenses of operation and the Company pays them on a scale on what they produce in premiums for the company.

Q. Do you know generally whether Mutual Companies have agencies, that is, whether they have agents employed on a commission basis or not?

A. Yes, sir.

Q. Do they? A. They do.

Q. Is that unusual or is it the ordinary thing with Mutual Companies? [292]

A. That is the usual thing in this territory.

Q. Several of them operate in this territory?

A. Yes, sir.

Q. Is that the way they operate?

A. Yes, sir.

Q. Now, do you know what general service is performed by the local agent both to the assured and the Insurance Company, what that consists of?

Mr. Horowitz: Object to that as incompetent, irrelevant and immaterial and improper rebuttal.

Mr. Whitla: I expect to show this advisory service is not as much as the local agent performs in the way of service. This is only one way to replace the local agent by another employee.

Mr. Horowitz: I object as incompetent, irrelevant and immaterial.

The Court: I agree with counsel, however, I am going to permit him to answer because—well, he may answer.

Mr. Horowitz: May my objection go to this line of testimony as being immaterial.

(Testimony of J. G. Adams.)

The Court: Yes, and I might say I feel that it is immaterial.

Mr. Whitla: If your Honor thinks it is immaterial I will not pursue it further. That is all. You may examine.

Mr. Hawkins: No questions. [293]

OSCAR NELSON

being recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination

By Mr. Whitla:

Q. You have been sworn? A. Yes, sir.

Q. As an insurance agent do you know whether there are mutual companies operating in this vicinity? A. Yes, sir.

Q. Do you know how they pay their agents, whether it is a commission basis or otherwise?

A. Yes, sir.

Q. How do they pay them?

A. On a commission basis principally.

Q. Is that a general thing in connection with the Mutuals operating in this vicinity?

A. Yes, sir.

Q. What has been your experience as far as qualifying yourself to act as an insurance man?

Mr. Horowitz: I don't see the materiality of this.

Q. State your qualifications?

(Testimony of Oscar Nelson.)

A. Besides taking care of my office since 1924 I have taken a correspondence course in Insurance and been back to Hartford in connection with the sales school.

Q. For what company? [294]

A. The Aetna Casualty and Surety Company.

Q. You have been agent for how long for that Company?

A. Twenty-three years and still am. I am past president of the Idaho Association of Insurance Agents. I am a member of the executive committee of the Idaho Association and I have represented the association in San Francisco meetings and with the contact committee with what is known as the Idaho Advisory Committee, it is a matter of getting the representatives and agents meeting together—now, those are some of my qualifications.

Q. In addition to that and in your work or business and with these committees to you have contact with Mutual Company operating in this territory? And do you know their practice relative to paying their agents?

A. Yes, sir. I might also say that I was called to Boise to consult at the time they drew this new Insurance law. I was there three different times.

Q. That was last winter? A. Yes, sir.

Q. Now, Mr. Nelson, have you any connection with the Idaho Compensation Company?

A. Yes, sir.

Q. You say you are connected with that company? A. Yes, sir. [295]

Q. What part of the business did you handle?

(Testimony of Oscar Nelson.)

A. I am general agent. My territory is the five northern counties.

Q. As general agent, what commission do they pay you?

Mr. Horowitz: I make the same objection that I made when the matter was first mentioned, that it is immaterial. The evidence shows that the matter of commission is a matter of contract between the agent and the insurance company.

The Court: That is true, except for the evidence placed in the record by the defendants, and in view of the testimony, he may answer.

Mr. Whitla: It is subject to my motion to strike, the other offer, and if it goes out, then of course my testimony will also go.

The Court: He may answer.

A. Seventeen and one-half per cent.

Q. (Mr. Whitla, continuing): Mr. Nelson, something was said here about a man by the name of Norton that worked for the Butler Company as an insurance man? A. Yes; I have met him.

Q. Who referred you to him?

A. Mr. Butler.

Q. Did he tell you in whose employ he was, and what he did? [296]

Mr. Horowitz: That is objected to as hearsay.

Mr. Whitla: He is the insured in this matter.

The Court: That objection will be sustained.

Q. Mr. Nelson, does the Idaho Bureau of Insurance put out a report yearly as to the companies in this state, the amount of business, and the number of agents they have, and things of that kind?

(Testimony of Oscar Nelson.)

A. They do; yes, sir.

Mr. Horowitz: This book that was handed to me, Mr. Whitla, do I understand you are restricting your offer to certain pages?

Mr. Whitla: Yes; I will have him identify the book.

Q. Mr. Nelson, I hand you what has been marked as Plaintiff's Exhibit No. 31, is that a copy of the report of the Bureau of Insurance of the State of Idaho for the year 1943, that is ending June 30th, 1943? A. Yes, sir.

Q. And that is for the fiscal year from June, 1942, to June, 1943? Is the report for two years?

A. No; for one year.

Mr. Horowitz: It is for the year ending June, 1943? A. Yes. [297]

Mr. Whitla: I ask to have this page, which is page "C" of this book—I ask to have it marked Exhibit "A", it shows the business transacted in Idaho by the miscellaneous companies during the year ending December 31st, 1942, and then page ten of the book showing the companies licensed in Idaho, and the number of agents they have, and other data, introduced to show the number of agents. I would like those two pages marked 31-A and 31-B. They are a part of Exhibit No. 31.

(Whereupon documents referred to were marked Plaintiff's Exhibits 31, 31-A and 31-B for identification.)

Mr. Whitla: And I now offer this in evidence.

Mr. Horowitz: We object to 31-A on the ground

(Testimony of Oscar Nelson.)

it is incompetent, irrelevant and immaterial. It purports to be a compilation of data showing the names of the companies engaged in health and accident, liability, workmen's compensation, fidelity, surety, plate glass, burglary and theft, property and auto damage and collision, property damages and collision other than auto, and miscellaneous. It shows under various headings the premiums retained or written, losses paid on the various types of insurance. It is utterly immaterial to any issue in this case. I don't see the purpose of having it offered, and I don't see the materiality. [298]

Mr. Whitla: It shows the names of the companies doing business in this state, how much business they are doing, and then back here (indicating) it shows the agents, and the number of agents, and it shows the companies who did not employ agents.

Mr. Horowitz: It is not a fair summary of any evidence.

The Court: It may be admitted so far as it has any information in it which goes to the companies that were mentioned by the testimony on the witness stand here on behalf of the defendants. The Court will only consider it to that extent, after examining the transcript.

Mr. Horowitz: As to the offer of 31-B, that purports to show the companies licensed, and the number of agents, the three dollar certificate of authority of agent, the filing fees for the year, and the premium on taxes, and the totals. That contains a number of companies that have not been men-

(Testimony of Oscar Nelson.)

tioned. I don't see the materiality of any of that information.

Mr. Whitla: It is material only in that they said that mutual companies don't employ agents.

Mr. Horowitz: I submit the evidence does not show it as Mr. Whitla has stated.

The Court: I think we have taken up a lot of time with immaterial matters—

Mr. Whitla (interposing): This is the last question.

The Court: There are only two matters here. The contract between Ware and the defendant; the other is the statute of Idaho. All of these other outside matters, as I have said repeatedly throughout this trial, I don't think they are material at all, any of those questions, or any of those matters. A great many times these matters have gone into the record without objection; other times, I have admitted them subject to the objection of counsel, although I thought they were immaterial at the time. Now, after admitting a great many matters that I felt were immaterial at the time, I don't like to stop now, but we will have to stop this case at some time or other. I am going to admit this simply because counsel says this is the last question.

(Whereupon Plaintiff's Exhibits 31, 31-A and 31-B for identification were admitted in evidence.)

Mr. Whitla: That is all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Nelson, the agency commission you spoke

(Testimony of Oscar Nelson.)

of as seventeen and one-half per cent, is that the general agent's commission? [300]

A. That is right.

Q. And out of that you pay to the producing agent for procuring the business?

A. Yes, sir.

Q. What do you pay them?

A. Ten per cent.

Q. Retaining seven and one-half per cent for yourself? A. That is right.

Mr. Hawkins: That is all.

Mr. Whitla: That is all; and the plaintiff rests.

Mr. Horowitz: We have no sur-rebuttal.

The Court: Then do I understand the defendants rest?

Mr. Horowitz: The defendants rest; yes, sir.

The Court: Now, we will wait for the transcript in this case, and after you have received the transcript, I will notify you when the Court will hear oral arguments; I am satisfied that after the oral arguments the Court will also want you to prepare and file briefs, and submit your authorities to the Court. I think, without doubt, the Reporter will have this transcript for you by the twelfth of this month, and then we can set the oral argument for the 28th, and I will, as soon as the transcript is prepared, have the exhibits all here with the Clerk in Coeur d'Alene, with authorization to [301] the Clerk that counsel may take to their office the exhibits and return them to the clerk when they are through with them. They will be available to attorneys for both parties. So that you will have your

briefs filed in an orderly fashion I will say now that of course I will not expect you to have your briefs prepared at the time of oral arguments, but after the oral arguments, I will give the plaintiff a certain length of time, and then defendants will have a certain time in which to file a reply, and the plaintiff may have additional time if it is necessary to file a reply brief.

Now, is there anything else that is not understood?

Mr. Hawkins: Do I understand that counsel will be notified as to the time for the oral arguments? Do I understand that the Clerk will advise counsel as to the date for oral arguments?

The Court: The date is now set for May 28th, and if there is any change in that date counsel will be notified by the Clerk, otherwise oral arguments will be heard at Coeur d'Alene on May 28th.

(Which was all of the evidence and proceedings adduced on said hearing.) [302]

REPORTER'S CERTIFICATE

United States of America,
State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting Official Reporter of the District Court of the United States, in and for the District of Idaho, Do Hereby Certify That I reported in shorthand the evidence and proceedings in the within and foregoing matter, and thereafter caused said shorthand notes to be transcribed into longhand typewriting, and that the within and foregoing con-

stitutes and is a full, true and correct copy of the transcript of said evidence and proceedings, consisting of two hundred and eight pages.

In Witness Whereof, I have hereunto set my hand this the day of May, A.D. 1947.

/s/ G. C. VAUGHAN,
Official Reporter.

Filed Feb. 13, 1948. [303]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORDS,
AND STATEMENT OF POINTS UPON
WHICH APPELLANTS WILL RELY

The appellant designates parts of the record which she thinks necessary for the cause of the appeal herein, to be printed as follows:

1. Complaint.
2. Answer.
3. Reply.
4. Motion for trial.
5. Application to amend answer and trial amendment of answer.
6. Orders for inspection of record, dated and filed April 3, 1946.
7. Stipulation.
8. Opinion.
9. Findings of fact, and conclusions of law.
10. Judgment.
11. Notice of appeal.
12. Proof of service notice of appeal.
13. Statement of the evidence to be prepared and submitted. [304]

14. Copies of this designation and statement.

The appellant submits herewith the following concise statements of points on which she expects to rely on the appeal:

1. The court erred in making and entering Finding of Fact No. 6, for the reason that by said Finding of Fact the court finds that the U. S. Navy, under the jurisdiction of the Bureau of Yards and Docks, required the making of the contract of the character claimed by the defendant as Comprehensive Rating Insurance Rating Plan for National Defense Projects, or designated War Projects Insurance Plan, and that such is not correct, is not sustained by the evidence, and that the record shows said plan was not to be operated in states where it was prohibited by law or was in conflict with the laws of the state, and erred in not finding that the plan was not permissible under the laws of the State of Idaho.

2. The court erred in finding that the policies were placed through the Acme Brokerage Corporation of New York for the reason that the evidence shows that the Acme Brokerage Corporation was acting for the Walter Butler Company as its agent, and its services were being paid for by the U. S. Government, and that it was not acting as a brokerage company in handling said insurance.

3. The court erred in making Finding of Fact No. 8 for the reason that the law of the State of Idaho became a part of the contract made between Eugene H. Ware and the [305] defendants, and that when it submitted the contracts to him for counter-

signing the same constituted the writing of the policies under the laws of the State of Idaho.

4. The Court erred in making Finding of Fact No. 9 for the reasons:

- a. That there was no contract made or entered into, as found in said paragraph;
- b. And that the contract between the parties was the contract which they had made and both signed, and that the alleged contract set forth is but a letter written by the defendant to the said Eugene H. Ware for a small amount of countersigning, and was intended by the defendants to evade the laws of the State of Idaho, and if valid for any purpose, was void as being against the public policy of the laws of the State of Idaho, and cannot be set up by the defendants to evade their written contract and the liability imposed by law;
- c. And that it is shown that immediately upon finding that the defendants claimed the policies in question were being written under said letter the said Eugene H. Ware refused to accept further compensation from them, and was never paid any sum after said policies were written whatsoever, and that no consideration, whatever, was ever paid to the plaintiff for countersigning said policies.

5. The Court erred in making Findings No. 11, for the reason that the said Eugene H. Ware rendered valuable services in having his office and

keeping his office open for the purpose of servicing said policies if called upon by the defendants, and that the finding that no services were required of a countersigning agent is contrary to the fact, and that countersigning agents are subject to be called upon for all services in servicing the policies countersigned by them.

6. The Court erred in making Finding of Fact No. 12 [306] for the reason that "it is immaterial" is not a correct statement of the law and is erroneous.

7. The court erred in making Finding No. 13 for the reason that it is not within the issues of this case, immaterial, and erroneous.

8. The court erred in making Conclusions of Law No. 2 for the reason that the statute does provide that the agents shall receive the full commission and that the full commission, as fixed by the contract and as testified to by witnesses, which testimony was undisputed, is the sum of ten per cent.

9. The court erred as a matter of law in concluding that no provision of said statute applied to the facts in this case so as to permit recovery, and that the provision in the statute providing for the full commission does form a basis for fixing commissions in this case.

10. The court erred in concluding as a matter of law he had been paid Five dollars a month therefore, for the reason that said alleged agreement, if there was any, is void, and that it is not shown that said alleged letter was intended to apply to this case, and that it was not considered by the said Eugene

H. Ware that it did, and that no payment was made after the services were performed, and that said alleged letter, if intended as the defendants contended, is an attempt by the defendants to violate the laws of the State of Idaho and is contrary to the public policy of the State of Idaho.

11. The court erred in entering a judgment in favor of the defendants and against the plaintiff for the reason [307] that the evidence in this case conclusively shows that the said Eugene H. Ware was a duly designated agent of the defendants, and that by his contract he was to be paid Ten per cent commission upon all workman's compensation without regard to the kind or character, and that such was the regular full commission allowable and generally paid to insurance agents in that vicinity, and said contract was in full force and effect at the time of the countersigning of the policies in question, and the law providing for the payment of said full commissions became a part of the contract and the action of the defendant in writing a letter does not permit them to evade the laws of the State of Idaho and that by reason thereof, under the evidence in this case, the plaintiffs were entitled to recover as the facts relative to the amount of premiums collected was stipulated in the case.

Dated this 24th day of January, A.D. 1948.

EZRA R. WHITLA,
E. T. KNUDSON,

Attorneys for Appellant, Residence and P. O. Address: Coeur d'Alene, Idaho.

(Affidavit of Service filed.)

Filed Jan. 27, 1948. [308]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION
UNDER RULE 36

Defendants, and each of them, request the plaintiff to make the following admissions for the purpose of this action only (reserving the right to make additional requests hereafter), and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That each of the following documents exhibited with this request is genuine:

Checks signed by the Travelers Insurance Company, in the sum of \$5.00 each, on "The Chase National Bank of The City of New York, Metropolitan Branch," payable to Eugene H. Ware Co. and bearing endorsement of payee, dated and numbered as follows:

10/22/36.....	No. X 477258	3/10/38.....	No. X 546367
11/20/36.....	No. X 478720	4/11/38.....	No. X 550759
12/15/36.....	No. X 482218	5/10/38.....	No. X 555661
1/25/37.....	No. X 487868	6/10/38.....	No. X 560179
2/15/37.....	No. X 492352	7/11/38.....	No. X 564446
3/15/37.....	No. X 492639	8/10/38.....	No. X 569069
4/15/37.....	No. X 497038	9/10/38.....	No. X 572136
5/15/37.....	No. X 502448	10/10/38.....	No. X 577317
6/10/37.....	No. X 507091	11/10/38.....	No. X 582634
7/10/37.....	No. X 511360	12/10/38.....	No. X 585794
8/10/37.....	No. X 515630	1/10/39.....	No. X 594951
9/10/37.....	No. X 520054	2/10/39.....	No. X 598524
10/11/37.....	No. X 524413	3/10/39.....	No. X 600765
11/10/37.....	No. X 524631	4/10/39.....	No. X 605283
12/10/37.....	No. X 533098	5/10/39.....	No. X 609543
1/17/38.....	No. X 535341	6/10/39.....	No. X 613559
2/21/38.....	No. X 542518	7/10/39.....	No. X 618660

8/10/39.....	No. X 623434	1/16/41.....	No. X 698701
9/11/39.....	No. X 627228	2/24/41.....	No. X 704409
10/10/39.....	No. X 630877	3/10/41.....	No. X 707697
11/10/39.....	No. X 635742	4/10/41.....	No. X 712315
12/11/39.....	No. X 640702	5/10/41.....	No. X 718237
1/25/40.....	No. X 648508	6/10/41.....	No. X 721355
2/10/40.....	No. X 653388	7/ 7/41.....	No. X 726030
3/11/40.....	No. X 654946	8/ 7/41.....	No. X 730647
4/10/40.....	No. X 658600	9/10/41.....	No. X 735665
5/10/40.....	No. X 663756	10/10/41.....	No. X 739832
6/10/40.....	No. X 668408	11/10/41.....	No. X 744578
7/ 6/40.....	No. X 672542	12/10/41.....	No. X 750788
8/ 7/40.....	No. X 677229	1/10/42.....	No. X 761368
9/ 7/40.....	No. X 680913	2/10/42.....	No. X 769605
10/10/40.....	No. X 686162	3/10/42.....	No. X 771012
11/ 9/40.....	No. X 690685	4/10/42.....	No. X 775370
12/10/40.....	No. X 695307	5/11/42.....	No. X 782899

2. That each of the following statements is true:

(w) That the original letter of October 21, 1936, copy of which is attached as Exhibit 1 to the answer, was received by Eugene H. Ware or Eugene H. Ware doing business as "Eugene H. Ware Company," on or about October 21, 1936, and remained in the possession of the said Eugene H. Ware up to the date of his death.

(x) That the original of the letter referred to in subparagraph (w) is now in the possession of the plaintiff.

Dated this 22nd day of July, 1946.

C. H. POTTS,

Address: Coeur d'Alene, Idaho.

CHARLES HOROWITZ,

Address: 2000 Northern Life
Tower, Seattle 1, Wash.

Of Counsel

PRESTON, THORGRIMSON,
HOROWITZ & TURNER.

(Service Acknowledged.)

Filed July 22, 1946. [310]

[Title of District Court and Cause.]

**ORDER GRANTING LEAVE TO AMEND AN-
SWER BY WAY OF TRIAL AMEND-
MENT**

The motion of the defendants, pursuant to Rule 15 of the Rules of Civil Procedure, for leave to amend Answer by way of trial amendment without the necessity of serving or filing an amended answer embodying said trial amendment having come on to be heard this day,

It Is Hereby Ordered that the trial amendment to the answer annexed to the motion for leave to amend answer by way of trial amendment as filed in the above-entitled cause be, and the same is hereby, granted and said proposed trial amendment shall be deemed added to the answer of the defendants on file herein without the necessity of serv-

ing or filing an amended answer embodying said amendment.

Done in Open Court this 30th day of April, 1947.

CHASE A. CLARK,
District Judge.

Presented by

CHARLES HOROWITZ,
WM. S. HAWKINS,
Attorneys for Defendants.

Filed April 30, 1947. [311]

[Title of District Court and Cause.]

RESPONDENTS' DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED

The respondents designate additional portions of the record, proceedings and evidence to be included as follows:

1. Request for admission under Rule 36, Paragraph 1, Paragraph 2(w) and 2 (x).
2. Order granting leave to amend answer by way of trial amendment, dated April 30, 1947.

Plaintiff's exhibits as follows:

3. Pl. Ex. 1.	7. Pl. Ex. 1-d.
4. Pl. Ex. 1-a.	8. Pl. Ex 4.
5. Pl. Ex. 1-b.	9. Pl. Ex. 5.
6. Pl. Ex. 1-c.	10. Pl. Ex. 5-A.

11. Pl. Ex. 5-B.	20. Pl. Ex. 5-K.
12. Pl. Ex 5-C.	21. Pl. Ex. 5-L.
13. Pl. Ex. 5-D.	22. Pl. Ex. 5-M.
14. Pl. Ex. 5-E.	23. Pl. Ex. 5-N.
15. Pl. Ex. 5-F.	24. Pl. Ex. 5-O.
16. Pl. Ex. 5-G.	25. Pl. Ex. 5-P.
17. Pl. Ex. 5-H.	26. Pl. Ex. 5-Q.
18. Pl. Ex. 5-I.	27. Pl. Ex. 5-R. [312]
19. Pl. Ex. 5-J.	

Defendants' exhibits as follows:

28. Df. Ex. 6.	42. Df. Ex. 18-B.
29. Df. Ex. 7.	43. Df. Ex. 18-C.
30. Df. Ex. 8.	44. Df. Ex. 18-D.
31. Df. Ex. 9.	45. Df. Ex. 18-E.
32. Df. Ex. 10.	46. Df. Ex. 18-F.
33. Df. Ex. 11.	47. Df. Ex. 19.
34. Df. Ex. 12.	48. Df. Ex. 20.
35. Df. Ex. 13.	49. Df. Ex. 21.
36. Df. Ex. 14.	50. Df. Ex. 22.
37. Df. Ex. 15.	51. Df. Ex. 23.
38. Df. Ex. 16.	52. Df. Ex. 23-A.
39. Df. Ex. 17.	53. Df. Ex. 24.
40. Df. Ex. 18.	54. Df. Ex. 29.
41. Df. Ex. 18-A.	55. Df. Ex. 30.

56. The transcript of the evidence (corrected) in question and answer form. A copy of the Reporter's Transcript of the testimony is in possession of each party hereto having been ordered pursuant to the request of the trial Court in connection with the argument. Respondents deem it im-

practical to delete from the Reporter's Transcript the testimony with reference to the non-included exhibits, Plaintiff's exhibits 2, 3, 25, 26, 27, 27-a, 31, 31-a, 31-b and defendants' exhibit 28, in view of the complexity and intermingled character of the testimony and, therefore, designate the entire Reporter's Transcript. [313]

57. "Respondents' Designation of Additional Portions of the Record, Proceedings and Evidence to be Included."

Appellant in Item 13 of "Designation of Contents of Records, and Statement of Points upon which Appellant will Rely" refers therein to "Statement of the evidence to be prepared and submitted." No statement of the evidence either in narrative or question and answer form has been submitted or filed to this date. Accordingly, it is impossible to determine to what extent the above items of additional portion of the records, proceedings and evidence will prove to be necessary until after the expiration of the ten-day period contemplated by Rule 75-a of the Rules of Civil Procedure. In view of the generality of the points upon which appellant will rely as stated by appellant, it is believed necessary that the record include all of the items designated by appellant and now designated by these respondents.

If appellant does not do so, respondents will make application to the District Court under Rule 75 (i), to send to the Circuit Court (in lieu of copies) each of the exhibits itemized above in view of their voluminous character and their complexity, and in

further view of the fact that pages of certain exhibits were offered by appellant and other pages of the same exhibit by the respondents.

Dated this 2nd day of February, 1948.

CHARLES HOROWITZ,

Residence and P. O. Address:

Seattle, Washington.

WM. S. HAWKINS,

Residence and P. O. Address:

Coeur d'Alene, Idaho.

(Service acknowledged.)

Filed Feb. 3, 1948. [314]

[Title of District Court and Cause.]

PETITION TO HAVE ORIGINAL EXHIBITS
FURNISHED CIRCUIT COURT OF AP-
PEALS

Now comes the above-named plaintiff and respectfully states and shows to this honorable court that in the appeal herein the plaintiff, as appellant, desires certain exhibits to be furnished to the Circuit Court of Appeals as a part of the record in this case. Said exhibits for the most part consist of photostatic copies of various instruments, including specimen forms which she desired should be sent to the Court in order that they can see the exact manner in which the policies were written in which the records are shown, and such cannot be

shown clearly by any typewritten copy thereof unless it could be done and shown on a form similar to the forms used by the defendant, which is an impractical proposition, and it is necessary, in the appellant's opinion, in order that the case may be properly submitted to the Circuit Court of Appeals that the original exhibits be furnished as a part of the record on appeal.

Wherefore the plaintiff, as appellant in this proceeding, [315] prays that an order may be entered herein directing that in lieu of attempting to make typewritten copies of said exhibits that the original be furnished by the Clerk of this court as a part of the record on appeal.

Dated this 9th day of February, A.D. 1948.

EZRA R. WHITLA,
E. F. KNUDSON,

Attorneys for Petitioner. Residence and P. O. Address, Coeur d'Alene, Idaho.

Filed: Feb. 11, 1948. [316]

[Title of District Court and Cause.]

ORDER

In this matter, upon the petition of the plaintiff, as appellant, that the original photostatic copies of record which are exhibits in this case and which have been required by the appellant on the appeal, be furnished to the Circuit Court of Ap-

peals as a part of said record, and it appearing to the Court that this is a proper case that the original records be furnished so that the Court can see exactly the manner in which the polities were written and the records kept.

It Is Ordered that the original exhibits called for by the appellant be forwarded by the Clerk of this Court to the Circuit Court of Appeals as part of the record on appeal herein.

Dated this 12th day of February, A.D. 1948.

CHASE A. CLARK,
Judge.

Filed February 12, 1948. [317]

[Title of District Court and Cause.]

APELLEES' (RESPONDENTS') SUPPLEMENTAL DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED, AND MOTION

The appellees (respondents) by this supplemental designation designate for inclusion in the record:

1. The entire reporter's transcript of the evidence, in question and answer form; and again request each of Items 1 to 57 originally contained in "Respondents' Designation of Additional Portions of the Record, Proceedings and Evidence to be Included."

This additional designation is made after receipt and examination of appellant's statement of the evidence (prepared partly in narrative and partly in question and answer form), appellees being dissatisfied therewith. Appellant has not furnished to appellees a corrected copy of the reporter's transcript, although appellees have in their possession the original reporter's transcript furnished at the conclusion of the trial below.

That the appellees (respondents) are advised by letter that the original transcript of the testimony has been filed with the Clerk of the Court and that the copies in the hands of counsel should be corrected as follows:

Page 23, line 5, insert word "not" after word "is," making it read * * * it is not a question * * *.

Page 27, last line, erase word "not" between words "did" and "secure."

Page 28, line 10, erase word "not" between words "did" and "make."

Page 33, line 8, change word "busy" to "business."

Page 52, line 16, change word "premium" to "Commission"—last word in line.

Page 53, line 4, change "and" to "a" between words "plus" and "fixed"; line 21, insert word "was" between words "testified" and "published."

Page 54, line 24, change word "find" to "determine." [318]

Page 56, line 19, change word "anything" to "anyone."

Page 59, line 5, change to read "paid to" instead of "to paid."

Page 61, line 5 from bottom, change word "which" to "each."

Page 65, line 3, change word "the" to "that" between the words "that" and "endorsement"—to read—"that that endorsement."

Page 68, line 2, change word "party" to "part."

Page 75, line 15, insert word "was" between words "which" and "identified."

Page 75, line 16, change word "approved" to word "involved."

Page 77, 6th line from bottom, change to read "the bond filed with the Industrial Accident Board."

Page 79, 4th line from bottom, change to show the question asked by Mr. Whitla.

Page 80, change to show that these questions are asked by Mr. Horowitz.

Page 82, line 13, change word "carrier" to "contractor."

Page 87, line 13, change word "is" to "are."

Page 91, 7th line from bottom, change word "companies" to "cases."

Page 113, line 16, change word "filed" to "field."

Page 130, correct spelling word "individuals."

Page 131, 8th line from bottom, insert "pay" between words "to" and "the."

Page 140, line 3, change word "support" to "supply."

Page 142, 4th line from bottom, change word "in" to "it."

Page 147, line 10 and 11, change the words "practice" to "taxes."

Page 154, line 15, change "Whitla" to "Horowitz."

Page 162, change "3106" to "3016."

Page 175, 3rd line from bottom, change "Whitla" to "Horowitz."

Page 176, line 2, change "plaintiff's" to "defendant's"; line 5, change "Horowitz" to "Whitla"; line 8, change plaintiffs to defendants; line 15, insert the words "on the" between the words "is" and "constitutional" and insert the word "question" after the word "constitutional."

Page 177, 7th line from bottom, change the word "or" to "before."

Page 182, line 5, add "s" to the word "endorsement."

The appellees (respondents) hereby move that the transcript of the testimony be further corrected in the following particulars:

Page 13, line 9, the word "refuned" should be "refunded."

Page 27, second line from bottom. The phrase "discovery or replies" should read "discovery exists." [319]

Page 42, line 2, insert after the word "reference" the words "in the stipulation."

Page 46. The court stated that the return premium was not a rebate within the meaning of the statute. The court reporter has not included his statement in the transcript.

Page 60, line 4, the word "Traverls" should read "Travelers."

Page 65, line 3, the reference to "the endorsements" should read "some endorsements."

Page 75, line 17, the phrase "made this certificate" should read "approved this insurance."

Page 87, line 12, the phrase "Navy approves the Travelers" should read "Navy approves the writing of the insurance here involved by the Travelers."

Page 91, seventh line from the bottom, the phrase "normal companies" should read "casualty companies."

Page 98, line 4, the phrase should read "No, that is the general practice."

Page 135, line 3, the phrase "Home Office policy" should read "Home Office record."

Page 135, line 6, the line reading "Home Office showing the endorsement space that has the endorsement" should read "Home Office showing in the endorsement space what is the endorsement."

Page 140, line 3, substitute for the word "support" the word "show."

Page 143, line 7, substitute for the word "plan" the word "form."

Appellees further move that appellant's counsel should be required to deliver the necessary copies of the reporter's transcript of the evidence as contemplated and required by Rule 75 (b).

2. Appellees' (respondents') supplemental designation of additional portions of the record, proceedings and evidence to be included.

Dated this 20th day of February, 1948.

CHARLES HOROWITZ,
WM. S. HAWKINS.

(Service acknowledged.)

Filed Feb. 20, 1948. [320]

[Title of District Court and Cause.]

ORDER

Good cause appearing therefore,

It Is Ordered That the time for filing and docketing the transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, be and the same hereby is extended to April 19th, 1948.

Dated at Boise, Idaho, this 1st day of March, 1948.

/s/ CHASE A. CLARK,
United States District Judge.

Filed March 1, 1948. [321]

[Title of District Court and Cause.]

ORDER

The appellees having moved the Court for an order correcting the transcript, and the Court having examined the record and being advised,

It Is Ordered That the transcript be corrected, as requested, as to page 13, line 9; page 27, second line from bottom; page 60, line 4; page 91, 7th line from bottom; page 135, line 3; and page 135, line 6.

As to the other requested corrections, the motion is overruled.

Dated at Boise this 8th day of April, 1948.

/s/ CHASE A. CLARK,

United States District Judge.

Filed April 8, 1948. [322]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 322, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same

constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$28.80, and that the same have been paid in full by the appellant.

In Witness whereof, I have hereunto set my hand
and affixed the seal of said court, this 16th day of
April, 1948.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 11901. United States Circuit Court of Appeals for the Ninth Circuit. Mary Broderick, Administratrix with the will annexed, of the Estate of Eugene H. Ware, deceased, Appellant, vs. The Travelers Insurance Company, a corporation, and The Travelers Indemnity Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Filed April 19, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11901

MARY BRODERICK, Administratrix with the
will annexed, of the Estate of Eugene H. Ware,
deceased,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
and THE TRAVELERS INDEMNITY COM-
PANY,

Appellees.

ORDER WAIVING PRINTING OF
ORIGINAL EXHIBITS

Good cause therefor appearing, It Is Ordered
that none of the original exhibits filed with the clerk
of this Court as a part of the certified transcript
need be included within the printed transcript, but
will be considered by this Court in their original
form.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

Dated San Francisco, Calif., April 29, 1948.

[Endorsed]: Filed April 30, 1948.

